Supreme Court, U.S.
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No. 09-___

IN THE

Supreme Court of the United States

JOHN ERROL FERGUSON
OR DOROTHY FERGUSON, INDIVIDUALLY
AND AS NEXT FRIEND ON BEHALF OF
JOHN ERROL FERGUSON,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
WALTER A. MCNEIL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision, which issued three months before this Court summarily reversed a different Eleventh Circuit opinion applying the same rule of decision, should likewise be summarily reversed or, at the least, vacated and remanded for further consideration in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009).

2. Whether the Eleventh Circuit correctly held—in conflict with decisions of this Court and at least four other circuits—that a petitioner suffers no prejudice where (i) his counsel failed to present any significant mitigation evidence during a capital-sentencing hearing and (ii) there existed substantial evidence concerning the petitioner's acute mental-health deficiencies and history of childhood abuse and privation.

3. Whether, in conflict with this Court's decisions, the Eleventh Circuit correctly held that a jury instruction to consider only statutory mitigation evidence in direct violation of *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), was harmless error.

PARTIES TO THE PROCEEDING

Petitioner John Errol Ferguson, or Dorothy Ferguson (as next friend on behalf of John Errol Ferguson), was petitioner in the District Court and appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondent Walter A. McNeil, Secretary for the Department of Corrections, was respondent before the District Court and appellee before the United States Court of Appeals for the Eleventh Circuit.

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SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Errol Ferguson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 580 F.3d 1183 (11th Cir. 2009) and is reproduced in

[1] For purposes of recusal, counsel for petitioner states that Hogan & Hartson LLP began representing petitioner in this matter in 1987.

the appendix to this petition ("App.") at 1a. The District Court's decision is unreported and is reproduced at App. 78a.

JURISDICTION

The Eleventh Circuit's judgment issued August 25, 2009. A timely filed petition for rehearing *en banc* was denied on December 31, 2009. App. 134a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

INTRODUCTION

In *Porter* v. *McCollum*, 130 S. Ct. 447 (2009), decided earlier this Term, this Court summarily reversed an Eleventh Circuit decision because the panel in that death-penalty habeas case had "unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Id.* at 454. Relying on a line of authority that began with *Williams* v. *Taylor*, 529 U.S. 362 (2000), this Court emphasized the obvious prejudice a petitioner suffers when—despite the existence of compelling mitigating evidence—the "judge and jury at * * * sentencing hear[ ] almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." *Porter*, 130 S. Ct. at 454.

This petition arises from another Eleventh Circuit decision issued three months before this Court's ruling in *Porter* (and by a panel that contained two of the three judges who were on the *Porter* panel).

Because the decision on review made the same mistakes that the panel's decision in *Porter* did, this Court should follow suit and summarily reverse. Alternatively, the Court should grant the petition and set the case for plenary hearing or, at the very least, vacate the judgment and remand to the Eleventh Circuit for further consideration in light of *Porter*.

There is no question that this Court's decision in *Porter* is outcome determinative. As in *Porter*, the petitioner here, John Ferguson, was convicted of multiple murders for which the Florida courts found multiple aggravating factors. As in *Porter*, due to counsel's stunningly deficient performance, *no* significant mitigation evidence was ever offered to the jury. And as in *Porter*, that failure was demonstrably prejudicial, for "[t]his is not a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.' " *Porter*, 130 S. Ct. at 454 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 700 (1984)). Just the opposite. But for counsel's neglect, Ferguson's juries "would have learned of the 'kind of troubled history [this Court] has declared relevant to assessing a defendant's moral culpability.' " *Id.* (quoting *Wiggins* v. *Smith*, 539 U.S. 510, 535 (2003)). They would have heard how Ferguson spent most of a decade in state-run mental hospitals. They would have heard how during that span he was examined at least eleven times, by seven different state-appointed doctors. They would have heard that every single one of those doctors diagnosed Ferguson as schizophrenic, psychotic, or hallucinating. They would have heard and read the reports of these psychiatrists, many of whom concluded that

Ferguson had "grossly impaired" judgment, that he cannot "understand[ ] the nature and consequences of his acts," and that he therefore should remain committed "for long-term psychiatric treatment." Hrg.Ex.36. They would have heard that, during one of Ferguson's brief respites from Florida's mental hospitals, he had been arrested on robbery charges but was ultimately found not guilty by reason of insanity. And they would have heard of the shocking abuse, violence, and privation Ferguson experienced as a child. *See infra* 5-10.

The Eleventh Circuit nevertheless found that counsel's failure to present any of this to the sentencing juries did not prejudice Ferguson. It did so because it relied on the same flawed approach that this Court rejected in *Porter*. Given the "extreme" facts of these crimes, App. 20a, the panel concluded that the large body of undisclosed mitigating evidence would not reasonably "lead a jury to *disregard* such cruel circumstances and impose a different sentence." *Id.* (emphasis added). But the test is not whether mitigating evidence is so powerful that it would actually cause a jury to "disregard" the brutality of a murder; it is doubtful that any evidence could ever do that. Instead, the touchstone remains the petitioner's moral culpability: Was the sentencing jury deprived of hearing "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability.'" *Porter*, 130 S. Ct. at 454 (quoting *Williams*, 529 U.S. at 398). Because the Eleventh Circuit's rule squarely conflicts with this Court's precedents, the petition should be granted.

STATEMENT OF THE CASE

A. Factual Background.

1. Ferguson's Childhood.

John Ferguson had a childhood defined by poverty, abuse, and privation. Forced to move nearly a dozen times to escape violent men—first his alcoholic father, later his mother's multiple boyfriends—Ferguson spent his formative years shuttling among squalid one-bedroom houses or apartments. Eight family members (and sometimes additional strangers) would cram into these blighted accommodations, many of which lacked such basics as electricity and running water. R.2922-23, 2958, 2963.[2]

But the frequent moves ultimately failed to shield Ferguson from violence. When drunk, Ferguson's abusive and alcoholic father would grab his mother by her hair and "throw [her] upside the wall." R.2924. Ferguson was five years old when police forcibly removed his father from the family's one-bedroom house, R.2924-25; his mother then moved Ferguson and her other children to a housing project where she frequently disciplined him with an iron cord, R.2926, 2995, and regularly left him in the care of an older sibling who beat him. R.2957, 2991-93, 3001.

For a time Ferguson and his siblings lived with one of his mother's boyfriends, who would abuse his

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[2] Because the Eleventh Circuit does not use a traditional joint appendix, the record citations in this petition reference multiple sources, as described in Ferguson's Eleventh Circuit Brief for Appellant at xv.

mother in front of Ferguson. R.2930, 2932-33. Ferguson was forced to intervene to "protect [his] mother" when he was thirteen. R.2933, 2961. The family then spent two years on the run while his mother's abusive boyfriend continued to track them, attacking and beating Mrs. Ferguson, stabbing her with a knife, and once shooting at the family's home. R.2961-62, 2974.

Ferguson's home life—such as it was—followed a sad and familiar pattern: Once Mrs. Ferguson found a new boyfriend or reconciled with an abusive one, she would often abandon Ferguson and his siblings. For instance, when Ferguson was about 11 years old, his mother deserted him and several of his siblings in an empty house overrun by snakes, scorpions, and chickens, R.2963, 3063, and lacking electricity or indoor plumbing, R.2934, 2963, 3063. He and two of his sisters were so agitated and lonely in that house that one day they attacked and killed the chickens in the yard because, as another sister explained, we "couldn't take it out on anybody else." R.3063.

Also around this time, Ferguson's father died of conditions resulting from alcohol abuse. R.2936. A few months after his father's death, Ferguson was committed to a state school. R.3096. He ultimately dropped out in the ninth grade. Hrg.Ex.35. A court-ordered medical report indicates Ferguson was "beat up by kids and has been a loner throughout his life." *Id.*; *see* Hrg.Ex.37 (same).

When Ferguson was 21, he was shot four times, including once in the head. Hrg.Ex.35, R.3011. That incident changed him forever. Immediately after returning from the hospital, Ferguson began to exhibit profound mental instability, irrationality,

and inexplicable hostility—conditions that would deteriorate with time. R.1536, 2943-44, 2968-69, 2976-78, 3011-15.

2. Ferguson's History Of Mental Illness.

Ferguson has a long history of mental illness. From 1969—the year he was shot—until 1978—the year he was arrested—he spent most of the time in mental hospitals. R.3093, 3098. He was examined at least eleven times, by seven different doctors, and every single one of them diagnosed Ferguson as schizophrenic, psychotic, or hallucinating. R.1589-1601; Hrg.Exs.34-43. In the mid-1970s, he was arrested on robbery charges for which he was ultimately found not guilty by reason of insanity. R.3054.

The reports of the court-appointed psychiatrists who examined Ferguson during this decade-long hospitalization portray a deeply disturbed mind. In 1971, Dr. Paul Jarrett observed that Ferguson "is functioning as a paranoid schizophrenic," "would be suggestible to various unwise influences upon him," and has such a "severely damaged ability to distinguish between right and wrong" that the doctor thought Ferguson "would commit illegal acts." Hrg.Ex.34. Ferguson told Dr. Jarrett that he heard voices, conversed regularly with his dead father, did not sleep on his jail bed because "they" put scorpions on his bed, and set fire to his jail cell "to keep them from coming in." *Id.* The doctor unequivocally recommended "psychiatric confinement." *Id.*

Also in 1971, Dr. Charles Mutter examined Ferguson during a state-ordered psychiatric examination. He found Ferguson's affect was

"inappropriate," he "showed evidence of auditory and visual hallucinations," he reported conversations "day and [ ] night" with his deceased father, and his judgment was "impoverished." Hrg.Ex.35. Dr. Mutter's diagnosis was clear: Ferguson was suffering from "paranoid schizophrenia," a "major mental disorder" that left him unaware of the consequences of his acts and "unable to adhere to the right." *Id.* Dr. Mutter recommended that Ferguson "be committed to a state hospital." *Id.* He reevaluated Ferguson in 1973 and reiterated that Ferguson "was suffering from a major mental disorder, namely paranoid schizophrenia," which "was characterized by hallucinations and a delusional system." Hrg.Ex.36. Dr. Mutter reported that Ferguson was still conversing with his deceased father, had an "inappropriate" affect, "marked autism," and "a persecutory delusion," and was hearing voices. *Id.* Ferguson, in Dr. Mutter's medical judgment, had "grossly impaired" judgment, "is dangerous to others," and cannot "understand[ ] the nature and consequences of his acts." *Id.* Dr. Mutter again recommended that Ferguson remain committed "for long-term psychiatric treatment." *Id.*

In 1973, Dr. Albert Jaslow became the third court-appointed doctor to evaluate Ferguson and determine that he was "psychotic and incompetent and requires additional hospitalization and treatment." Hrg.Ex.37. As Dr. Jaslow noted, "his reality testing was defective," he was "actively psychotic," he reported conversations with his deceased father, and he described headaches caused by roaches and "very small" people placed inside his brain. *Id.*

In 1974, a fourth court-appointed psychiatrist, Dr. William Corwin, evaluated Ferguson. Hrg.Ex.38. Dr. Corwin, like Drs. Jarrett, Mutter, and Jaslow before him, reported that Ferguson "is suffering from a psychosis, schizophrenia, of a chronic nature" and should remain hospitalized for further treatment. *Id.* He again confirmed that Ferguson's judgment was "impaired" and noted that Ferguson's "[h]allucinations and delusions [we]re freely expressed." *Id.* Dr. Corwin evaluated Ferguson later in 1974 and he reaffirmed his diagnosis: schizophrenia of a chronic nature. Hrg.Ex.39.

In 1975, Dr. Stillman became the fifth psychiatrist to evaluate Ferguson and observe—like each of the four court-appointed psychiatrists before him—that "[c]linically we are dealing with a grossly disturbed young man who demonstrates a clinical picture of a severe psychosis, a major mental disorder, of the schizophrenic variety, paranoid type." Hrg.Ex.40. Ferguson expressed "a good deal of delusional material of a paranoidal nature and admitted to hallucinatory experiences of a visual type," "did not understand the motives for his behavior," "does not know right from wrong and does not know the nature and consequences of his acts." *Id.* Dr. Stillman issued a warning: Ferguson should be continuously treated in a secure setting because his "degree of irrationality coupled with a rather impulsive, explosive and aggressive nature makes him a rather dangerous person both to himself and to others." *Id.*

In 1975, Dr. Mutter's re-examination of Ferguson again revealed that Ferguson had an "inappropriate" affect, "was autistic," had hallucinations and persecutory delusions, and was suffering from

paranoid schizophrenia. Hrg.Ex.41. Dr. Mutter warned that Ferguson "is dangerous to the point where he is considered homicidal" and "should be in a maximum security ward." Dr. Mutter's forewarning: "He needs long-term psychiatric treatment and should not be released under any circumstances." *Id.* He reiterated that warning a month later, emphasizing that Ferguson "has a long-standing, severe illness which will most likely require long-term inpatient hospitalization. This man is dangerous and cannot be released under any circumstances." Hrg.Ex.42.

Despite the repeated warnings of the court-appointed psychiatrists that Ferguson was "extremely dangerous," should remain hospitalized, and did "not know right from wrong" or "the nature and consequences of his acts," Ferguson was deemed "mentally competent" and discharged.

B. The Crimes.

The psychiatrists' uniform clinical predictions proved prescient. On July 27, 1977, Ferguson, Marvin Francois, and another man entered a home in Carol City, Florida looking for drugs and money. After Francois' mask fell and revealed his face, six of the eight people in the house were shot and killed. The evidence later showed that Francois was the "triggerman" who killed at least five of the six victims. RCC 712. Ferguson was directly linked to one shot, which grazed one victim; she was treated and released from a hospital the next day. RCC 351. Ferguson had tried to dissuade Francois from killing anyone, RCC 447, and had attempted to comfort some of the victims. RCC 321-23, 343, 351.

Six months later, on January 8, 1978, the bodies of two teenagers in Hialeah, Florida were found. Both had been shot in the head; one had been sexually assaulted. When Ferguson was arrested pursuant to a warrant for unlawful flight to avoid prosecution for the Carol City murders, on April 5, 1978, the police found a gun in his possession capable of firing bullets matching those used to kill the two teenagers in Hialeah. App. 5a.

C. Trial Proceedings.

Ferguson was tried on six counts of first degree murder in the Carol City case and two counts of first degree murder in the Hialeah case (among other charges). The cases were tried before separate juries, but the same judge presided over both trials and Ferguson's initial sentencing proceedings.

Ferguson was convicted of murder in both cases. But Ferguson's counsel put on *no* mitigation evidence—none—about his long history of mental illness or his harsh and violent early upbringing during the sentencing phases of the two trials.

Ferguson's counsel in the Carol City trial, Fred Robbins, later admitted that he did not investigate either Ferguson's history of diagnosed mental illness or his stunted childhood. R.3035, 3051. Instead, the sum total of Robbins's mental-health investigation was to read the reports of four psychiatrists appointed by the court after Ferguson initially entered an insanity plea. Those reports noted that Ferguson had undergone numerous other psychiatric examinations, but Robbins did not attempt to locate those records. Nor did he examine Ferguson's criminal records—which would have shown that

Ferguson previously had been found not guilty by reason of insanity. Nor did he attempt to locate other public records about Ferguson and his long history of illness and confinement on mental-health grounds. Nor did he ask Ferguson's mother and sister about his upbringing. Nor did he contact Ferguson's other siblings seeking insights or mitigating testimony. At the end of Robbins's desultory efforts, at the sentencing phase, Robbins called a single witness—Ferguson's mother—from whom he elicited 76 words of "unilluminating" testimony. App. 17a n.7. Robbins later testified that had he known of Ferguson's mental-illness records and insanity acquittal, he would have presented that information during the penalty phase. R.3035, 3052-55.

Ferguson's counsel in the second trial delivered the same stunningly subpar representation: "In the penalty phase of the Hialeah trial, no mitigating evidence was presented by the defense." *Ferguson* v. *State*, 593 So. 2d 508, 511 (Fla. 1992). Michael Hacker, the attorney in charge of the penalty phase of the Hialeah trial, did not investigate Ferguson's upbringing because he erroneously believed that evidence of nonstatutory mitigating circumstances was inadmissible. R.3165-66. He also failed to discuss mitigation with Ferguson's siblings. And although he called Ferguson's mother to the stand to testify during the penalty phase, he excused her without eliciting a single word of testimony because "she broke down on the witness stand." App. 21a, 119a-120a. While some of Ferguson's mental-health history came into evidence during the guilt phase of the trial as part of an unsuccessful insanity defense, at no point during the mitigation stage did

Ferguson's counsel put mental-health experts on the stand to speak to his long and consistent diagnoses.[3]

Compounding his counsels' failure to investigate or present significant mitigating evidence, the judge in both trials erroneously instructed the juries that they could consider only statutory mitigating circumstances. As the panel below acknowledged, App. 31a, 35a, that instruction clearly violated this Court's decision in *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987); indeed, it was the exact same Florida jury instruction that this Court struck down in *Hitchcock* for improperly precluding the jury "from considering any relevant mitigating evidence." *Id.* at 394. The jury's inability to consider nonstatutory mitigating evidence was particularly damaging during the Hialeah trial. That is because, although Ferguson's lawyer failed to proffer a shred of evidence or testimony during the sentencing phase, he had nevertheless alluded to some—though certainly not all—of Ferguson's troubling mental-health history during the guilt phase as part of the unsuccessful insanity defense. But to the extent the jury even considered that evidence, it could do so only if it satisfied one of the narrow statutory mitigating factors. Yet despite those restrictions, at least two jurors voted to spare Ferguson's life in the Hialeah trial. App. 21a.[4]

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[3] The standard for finding statutory mitigating circumstances is lower than the standard for finding a defendant not guilty by reason of insanity. *Compare* Fla. Stat. § 921.141(6)(b) *with* § 921.141(6)(f) (1977).

[4] It is entirely possible that as many as five jurors voted to spare Ferguson's life. The uncertainty stems from the trial judge's decision to cut short the jury poll. The judge had asked

The juries in both cases ultimately recommended the death penalty. The single judge hearing both cases imposed it.[5]

D. State Post-Conviction Proceedings.

In 1987, Ferguson, with his mother as next friend, filed in state court a timely motion for post-conviction relief. For purposes of this petition, the relevant claims were two: an ineffective-assistance-of-counsel claim based on trial counsels' failure to investigate and present mitigation evidence, and a *Hitchcock* claim based on the judge's erroneous jury instructions.

Ferguson presented testimony from several family members about his childhood, his alcoholic father's death, his mother's physical abuse, and how

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each juror to confirm that a majority of them had voted to recommend death. The first two jurors, however, understood the judge to ask how each juror had voted, and the first two indicated that they had voted to spare Ferguson's life. The judge immediately halted the poll to clarify that the jurors were to indicate only whether the foreman's announcement of a death recommendation corresponded with the majority's decision. App. 24a & n.17; R.3151. Florida is an "outlier" state; it is "the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote." *State* v. *Steele*, 921 So. 2d 538, 548-550 (Fla. 2005). *See* Fla. Stat. § 921.141 (2008).

[5] The Florida Supreme Court vacated the initial sentences due to sentencing errors. *Ferguson* v. *State*, 417 So. 2d 631 (Fla. 1982); *Ferguson* v. *State*, 417 So. 2d 639 (Fla. 1982). On remand, a new judge, who had not presided over either trial, re-imposed the death sentences without holding a sentencing hearing; he simply relied on the cold transcript of the previous sentencing proceedings. The Florida Supreme Court affirmed. *Ferguson* v. *State*, 474 So. 2d 208 (Fla. 1985).

Ferguson's behavior changed so radically for the worse after he was shot multiple times as a young man. Ferguson also presented evidence that his trial counsel had not obtained doctors' reports, hospital records, school records, or court records containing relevant mitigation evidence. The court denied Ferguson's claim of ineffective assistance of counsel and *Hitchcock* error, and the Florida Supreme Court affirmed. *Ferguson* v. *State*, 593 So. 2d 508, 510-511 (Fla. 1992).

E. Federal Habeas Proceedings.

In March 1995 Ferguson, with his mother as next friend, filed a federal habeas corpus petition in federal court.[6] His petition presented several arguments, but again only two are relevant here: (i) an ineffective-assistance-of-counsel claim for failing during the penalty phases of both trials to proffer *any* evidence of Ferguson's profound and longstanding mental illness or his savagely poor and violent childhood, and (ii) a *Hitchcock* claim.

Concurrent with the filing of his petition seeking habeas relief, Ferguson moved to stay proceedings due to his incompetence. The court denied that stay

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[6] Because Ferguson filed his petition in 1995, one year before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), pre-AEDPA law applies to his claim. *See Lindh* v. *Murphy*, 521 U.S. 320, 326-327 (1997). Under pre-AEDPA law, the prejudice inquiry under *Strickland* and the harmless error analysis under *Hitchcock* receive *de novo* review, as in post-AEDPA cases where the state court did not reach the issue of prejudice or harmless error. *See Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005) (applying *de novo* review where state court did not reach prejudice prong under *Strickland*); *Wiggins*, 539 U.S. at 534 (same).

motion four years later. Doc.#1, 4, 21. Ferguson filed a Second Amended Petition and again moved to stay proceedings based on his incompetence in September 2003. After holding an evidentiary hearing to determine Ferguson's competency, the District Court denied Ferguson's motion to stay and his habeas petition in the same ruling. Doc.#108, 109.

On Ferguson's ineffective-assistance claims, the District Court summarily concluded as to both cases that there could be no prejudice to Ferguson "[g]iven the overwhelming aggravating factors in [each] case." App. 118a. In evaluating the *Hitchcock* error, the District Court acknowledged that the trial court had given the jury an unconstitutional instruction to disregard nonstatutory mitigating evidence. But the court nonetheless concluded that the error in the Carol City trial was cured by a later instruction, and that the error in the Hialeah trial was "harmless" because—again—of the existence of "multiple serious aggravating factors." App. 123a. Ferguson appealed.

The Court of Appeals assumed that Ferguson's lawyers in both trials had been deficient in failing to discover and present any of the powerful mitigating evidence. App. 18a, 22a-23a. The panel concluded, however, that Ferguson could not satisfy the prejudice prong of an ineffective-assistance claim. In the panel's assessment, it was not reasonably probable that a jury would have imposed a different sentence in light of the multiple aggravating factors found in each case. App. 18a-20a, 23a. The panel further found that even though the jury instructions in both cases constituted a *Hitchcock* error, the error

was harmless, again because of the multiple aggravating factors in each case. App. 37a-38a.

It did not matter that Ferguson had spent the better part of the previous decade in state-run mental hospitals, that he had suffered a viciously troubled childhood, or that the jury that sentenced him to death had not heard any of this humanizing evidence. In the panel's estimation, only the "multiple, egregious aggravating factors" mattered. In reaching this result, the panel effectively endorsed a new rule of decision: that where aggravating factors are sufficiently numerous or "extreme," no amount of mitigating evidence can make a difference. App. 18a-20a, 23a, 37a-38a.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Eleventh Circuit below—as it did in *Porter*—disregarded powerful mitigation evidence that would have established the "kind of troubled history [this Court] ha[s] declared relevant to assessing a defendant's moral culpability." *Porter*, 130 S. Ct. at 454 (citation omitted). The Eleventh Circuit did so because, in its view, none of this evidence would have reasonably "le[d] a jury to *disregard* [the] cruel circumstances [of the crimes] and impose a different sentence." App. 20a (emphasis added). But that is not the test, as this Court's intervening decision in *Porter* confirms. The correct inquiry instead is whether the sentencing jury was deprived of hearing "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability,' "

Porter, 130 S. Ct. at 454 (quoting *Williams*, 529 U.S. at 398), and thereby "establish 'a probability sufficient to undermine confidence in [the] outcome.'" *Id.* at 455-456 (quoting *Strickland*, 466 U.S. at 693-694). Because the Eleventh Circuit's rule squarely conflicts with *Porter* and this Court's other precedents, the petition should be granted.

A. The Eleventh Circuit's Decision Conflicts With This Court's Intervening Decision In *Porter*.

Three months after the Eleventh Circuit decided Ferguson's appeal, this Court announced its decision in *Porter*. There, the Court summarily reversed a different Eleventh Circuit habeas ruling, identifying precisely the same basic errors that plagued the panel's decision below. Because this Court's intervening decision in *Porter* squarely rejects the same approach that the Eleventh Circuit took in Ferguson's case, the petition should be granted and—if not considered on a plenary basis—at least vacated and remanded for further consideration in light of *Porter*.

Porter involved multiple murders and multiple aggravating factors (three), including a finding that the murders were "committed in a cold, calculated, and premeditated manner." *Id.* at 449. Porter's counsel presented no significant mitigating evidence during the sentencing phase of the trial, even though significant mitigation evidence—including evidence concerning the defendant's history of mental-health issues and his abusive childhood—was readily available. *Id.* The Eleventh Circuit had brushed all this mitigating evidence aside, emphasizing instead the "heavy weight" of the aggravating factors. *Porter*

v. *Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008).

This Court unanimously and summarily reversed. Rejecting the Eleventh Circuit's narrow focus on the "heavy weight" of the aggravating factors, this Court clarified that the prejudice inquiry demands a wider aperture. That inquiry begins, this Court held, by examining what mitigating evidence the jury actually heard. For only then can a court assess whether "new evidence 'would * * * have altered the sentencing profile presented to the sentencing judge.'" *Porter*, 130 S. Ct. at 454 (quoting *Strickland*, 466 U.S. at 700). In Porter's case, the discrepancy between what the jury heard and what it *ought* to have heard was stark. His counsel during sentencing had "put on only one witness, Porter's ex-wife, and read an excerpt from a deposition." *Id.* at 449. But there was so much more Porter's counsel should have discovered and offered: Porter's "abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id.*

This Court concluded that counsel's deficiencies fundamentally prejudiced Porter at sentencing. *Id.* at 454. The evidence that counsel could have offered was "significant," *id.* at 448, and his jury had "heard absolutely none of that evidence, evidence which 'might well have influenced the jury's appraisal of [Porter's] moral culpability.'" *Id.* at 454 (quoting *Williams*, 529 U.S. at 398).

In reaching that result, this Court ruled that the contrary no-prejudice conclusion reached by the Eleventh Circuit and the Florida Supreme Court was

objectively unreasonable. *Id.* at 454 (both courts "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). That is because the Eleventh Circuit and the Florida Supreme Court had unreasonably focused on—to the exclusion of virtually all else—the "heavy weight" of the aggravating factors and the brutality of this "cold, calculated, and premeditated murder." *Porter*, 552 F.3d at 1272. But even though the "cold, calculated, and premeditated" factor "is one 'of the most serious aggravators set out in [Florida's] statutory scheme,'" *id.* at 1271 (citation omitted), this Court explained that an exclusive focus on aggravating factors is wrong. As the Court reaffirmed, "[w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter*, 130 U.S. 455-456 (quoting *Strickland*, 466 U.S. at 693-694). And "Porter ha[d] done" exactly that. *Id.* at 456.

As has Ferguson. This, too, is "not a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.'" *Id.* at 454. Whereas Porter's counsel put his ex-wife on the stand and read from a deposition, Ferguson's lawyer in the first trial put only Ferguson's mother on the stand. Even then, he managed to elicit 76 words of perfunctory testimony before excusing her. Counsel in the second trial managed to do even worse. He called Ferguson's mother to the stand, only to excuse her immediately after she began sobbing on the witness stand. The upshot: The jury at both trials "heard almost

nothing that would humanize [Ferguson] or allow them to accurately gauge his moral culpability." *Id.*

And there was, of course, a trove of evidence that would have done just that. *See supra* 5-10. Had Ferguson's counsel been effective, the judge and jury would have heard how Ferguson spent most of a decade in state-run mental hospitals. R.3093, 3098. They would have heard how during that span he was examined at least eleven times, by seven different state-appointed doctors, and that every single one diagnosed Ferguson as schizophrenic, psychotic, or hallucinating. R.1589-1601; Hrg.Exs.34-43. They would have heard and read the reports of these psychiatrists, many of which concluded that Ferguson had "grossly impaired" judgment, that he cannot "understand[ ] the nature and consequences of his acts," and that he therefore should remain committed "for long-term psychiatric treatment." Hrg.Ex.36. They would have heard that, during one of Ferguson's brief respites from Florida's mental hospitals, he had been arrested on robbery charges but was ultimately found not guilty by reason of insanity. R.3054. And they would have heard, of course, of the abuse, violence, and privation Ferguson experienced as a child. *See supra* 5-7.

But as in *Porter*, Ferguson's judge and jury "heard absolutely none of that evidence." 130 S. Ct. at 454. And as in *Porter*, this was precisely the sort of "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability.' " *Id.* (citation omitted). In short, " 'there exists too much mitigating evidence that was not presented to now be ignored.' " *Id.* at 455 (citation omitted).

The Eleventh Circuit though did ignore that evidence—for virtually the same reasons that it had identified in Porter's case. The *Porter* panel discounted the significant undisclosed mitigation evidence because of the "heavy weight" of the aggravating factors and the brutality of the "cold, calculated, and premeditated" murder. *Porter*, 552 F.3d at 1272. The *Ferguson* panel used a different adjective—"extreme"—but the substantive rule it applied was essentially the same. Because the undisclosed mitigation evidence here, as in *Porter*, "establishe[s] 'a probability sufficient to undermine confidence in [the] outcome' " of the sentencing phase, the petition should be granted. *Porter*, 130 S. Ct. at 455-456 (citation omitted). At the very least, the petition should be granted, the judgment vacated, and the matter remanded to the Eleventh Circuit for further consideration in light of this Court's intervening decision in *Porter*. *See Wellons* v. *Hall*, 130 S. Ct. 727, 731 (2010); *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

B. The Eleventh Circuit's Decision Conflicts With *Rompilla*, *Wiggins*, *Williams*, And Other Precedents Of This Court.

Not only does the Eleventh Circuit's prejudice analysis run afoul of *Porter*, but it also contradicts the way this Court has assessed prejudice in other recent cases. In *Rompilla*, the Court assessed whether a defendant sentenced to death based on three aggravating circumstances was prejudiced by a mitigation case consisting entirely of five family members' "beseech[ing] the jury for mercy, saying that they believed Rompilla was innocent and a good man." 545 U.S. at 378. Rompilla's counsel had not

reviewed Rompilla's prior conviction records, *id.* at 383-384, which contained leads to "significant mitigation evidence" demonstrating that Rompilla "had a troubled childhood and suffered from mental illness and alcoholism." *Id.* at 378-379.

The Court concluded that Rompilla was prejudiced by his counsel's failure to explore and present that mitigating evidence to counter the State's evidence of aggravated culpability. *Id.* at 390-393. The unpresented mitigating evidence in *Rompilla* was remarkably similar to the evidence in this case: physical abuse during childhood, a generally disadvantaged upbringing, and an "extreme mental disturbance." *Id.* at 391-392. The Court weighed the totality of that mitigating evidence in holding that "the mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability." *Id.* at 393. The unpresented evidence thus "add[ed] up to a mitigation case that b[ore] no relation to the few naked pleas for mercy actually put before the jury." *Id.*

The same is true here. As in *Rompilla*, the fact that the jury was asked to appraise Ferguson's moral culpability without having heard evidence bearing directly on that assessment—his miserable background and his history of mental illness—undermines confidence in the jury's conclusion as to his moral culpability. Indeed, *Rompilla* counsels against exactly what the Eleventh Circuit did below: permitting the existence of aggravating factors to categorically preclude the possibility that mitigating evidence could have affected the jury's or judge's sense of moral culpability. In contrast to the

Eleventh Circuit's decision, *Rompilla* makes clear that mitigating evidence cannot be discounted just because a crime is "extreme."

Other decisions from this Court are to the same effect. In *Wiggins*, for example, the Court found prejudice because, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537. In *Williams*, the Court reversed a lower court's finding of no prejudice because the lower court failed to evaluate "the totality of the available mitigation evidence." 529 U.S. at 397; *see id.* at 398 (explaining that mitigating evidence unrelated to aggravating factors "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case"). And in *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-113 (1982), the Court explained that consideration of mitigation evidence is necessary to ensure "a system of capital punishment that is at once consistent and principled but also humane and sensible to the uniqueness of the individual."

Ultimately, the prejudice inquiry "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Williams*, 529 U.S. at 393 n.17. By definition, a death sentence is unreliable and fundamentally unfair when it does not result from an accurate "individualized inquiry" into the particular moral culpability of the defendant. The Eleventh Circuit's reliance on the presence of "extreme" aggravating factors—and those factors alone—effectively guts this Court's

longstanding rule requiring death sentences to be based on individual considerations that help define a defendant's moral culpability. *See Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998) (capital sentencing requires a "broad inquiry into all relevant mitigating evidence to allow an individualized determination"); *Jones* v. *United States*, 527 U.S. 373, 381 (1999) (capital sentencing scheme, to be constitutional, must "ensure that capital sentencing decisions rest upon an individualized inquiry").

The Eleventh Circuit ignored the significant mitigating evidence that Ferguson's counsel never introduced during the penalty phases of his trials because "the facts of this case are extreme" and numerous aggravating factors were present. App. 18a-20a, 23a. But this Court's jurisprudence has never suggested that prejudice turns on a comparison of the *quantity* of aggravating or mitigating factors. *See, e.g.*, *Brewer* v. *Quarteman*, 550 U.S. 286, 294 (2007) (holding that mitigating evidence is not "a matter purely of quantity, degree, or immutability"). Rather, it is the quality of the evidence; how well that evidence illuminates the defendant's moral culpability. The Eleventh Circuit's flawed approach follows none of this Court's guidance on assessing prejudice from unpresented mitigation evidence. Review—and reversal—is warranted.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF AT LEAST FOUR OTHER CIRCUITS OVER THE TEST FOR EVALUATING PREJUDICE CAUSED BY UNPRESENTED MITIGATION EVIDENCE.

At least four federal circuits have rejected the rationale that the Eleventh Circuit adopted here (and in *Porter*). As one court of appeals recently put it, the suggestion that a defendant "suffered no prejudice because the brutality of his crime eclipses any mitigating evidence[ ] is a non-starter." *Walbey* v. *Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009).

The Sixth, Eighth, Ninth, and Tenth Circuits have all found prejudice under *Strickland*—even in the face of unspeakably atrocious crimes—where counsel failed to present the jury with the same sort of powerful mitigating evidence that Ferguson's lawyers failed to introduce.[7] Only the Eleventh Circuit has held that the "extreme" or "cruel" nature of a defendant's crime can outweigh the prejudice that inheres when counsel fails to offer the

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[7] In addition, the Fourth and Fifth Circuits have reached conclusions similar to the Sixth, Eighth, Ninth, and Tenth Circuits in cases involving a single heinous murder. *See Gray* v. *Branker*, 529 F.3d 220, 236 (4th Cir. 2008) (granting habeas relief on grounds of ineffective assistance of counsel where the jury returned a death sentence after finding three aggravating factors but was not told that the defendant "suffered from a severe mental illness," which "would surely have provided a significant boost to [the defendant's] mitigation case"); *Walbey*, 309 F. App'x at 804 (rejecting a so-called "brutality trumps" argument and holding that the fact that a defendant's crime was "extremely brutal" does not categorically defeat the prejudice prong of the ineffective-assistance analysis).

sentencing jury any meaningful evidence to mitigate the defendant's moral culpability, no matter how extensive or evocative that evidence is.

Tenth Circuit. In *Smith* v. *Mullin*, 379 F.3d 919 (10th Cir. 2004), the Tenth Circuit considered a habeas petition from a defendant sentenced to death for each of five murders (stabbing to death his wife and two stepsons and asphyxiating two step-daughters) where his counsel failed to present mitigation evidence during the penalty phase of his trial. *Id.* at 924, 944 n.12. The case involved 24 aggravating circumstances: four in his wife's murder and five in each child's murder. *Id.* at 944; *Smith* v. *State*, 932 P.2d 521, 539 (Okla. Crim. App. 1996).

The court found that the "meager presentation of mitigating evidence fell below the constitutional minimum," in light of the "significant" mitigating evidence that could have been—but was not—presented. *Smith*, 379 F.3d at 939, 941. All counsel had done during sentencing was to call Smith's family and friends to testify that they loved him and that he was kind and considerate. But his counsel "made no attempt to explain how this kind and considerate person could commit such a horrendous crime, although mental health evidence providing such an explanation was at his fingertips." *Id.* at 939-940. That mental-health evidence included that Smith nearly drowned as a child, had mental impairments for which his family could not afford treatment, was "beaten by his classmates" for being "slower," and was abused by his aunt as a child. *Id.* at 941-942.

Although recognizing that the "case in favor of the death penalty was strong," *id.* at 944, the Tenth

Circuit nevertheless concluded that the petitioner was prejudiced because the mitigation evidence that his counsel failed to present during the penalty phase was "exactly the sort of evidence that garners the most sympathy from jurors." *Id.* at 942. Because juries " 'are more likely to vote for life rather than death sentences in cases where there is * * * clear and clearly presented evidence that the defendant has suffered from some form of mental illness,' " the Tenth Circuit concluded that Smith was prejudiced by his counsel's failure to present this evidence. *Id.* (citation omitted). As the court explained, had the jury known of this mitigating evidence and therefore been able to place "this compelling explanation for his behavior [ ] 'on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.' " *Id.* at 944 (quoting *Wiggins*, 539 U.S. at 537).

Ninth Circuit. In *Correll* v. *Ryan*, 539 F.3d 938, 940 (9th Cir. 2008), the habeas petitioner had been sentenced to death for a triple homicide. Four aggravating circumstances applied, including that the murders "were committed in a cruel, heinous, and depraved manner." *State* v. *Correll*, 715 P.2d 721, 734 (Ariz. 1986); *Correll*, 539 F.3d at 948.[8] But during the penalty phase "defense counsel put on no affirmative penalty phase defense whatsoever," *id.* at 946, and "[t]he entirety of his oral argument at the

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[8] Correll and an accomplice robbed the victims, bound them with duct tape, drove them into the desert, and shot them one by one "to cold-bloodedly eliminate any and all witness[es] to the robbery." *Correll*, 715 P.2d at 734. The third victim suffered through multiple misfires before they killed her. *Id.*

penalty phase consists of approximately 7 pages of transcript." *Id.* at 948.

The Ninth Circuit found that counsel had been ineffective because "there was a substantial amount of classic mitigating evidence that could have been presented, but was not." *Id.* at 952. And the court found prejudice because this "classic" evidence involved "a history of drug addiction," an "abusive childhood," and "evidence of Correll's psychological disorders." *Id.* at 950, 952. Correll had been committed to psychiatric institutions at least twice, was described as "severely psychologically impaired," and had twice attempted suicide. *Id.* at 953. Despite the gruesome crimes for which the petitioner had been convicted, the Ninth Circuit faithfully applied this Court's precedents to conclude that this "substantial" mitigation evidence, when "taken together, is sufficient to raise a presumption of prejudice under the Supreme Court's standard in *Wiggins*." *Id.* at 953-954 (citing *Wiggins*, 539 U.S. at 534-538).

Eighth Circuit. Likewise, in *Simmons* v. *Luebbers*, 299 F.3d 929 (8th Cir. 2002), the Eighth Circuit found that counsel's failure to present any meaningful mitigation evidence prejudiced the petitioner, even though the jury had convicted him of two disturbing murders and found multiple aggravating factors to exist.[9] The juries found that

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[9] Simmons brutally murdered two women. He "savagely beat[ ] and strangled [one of them] for four to five minutes before" she died. *State* v. *Simmons*, 955 S.W.2d 729, 752 (Mo. 1997). He bound the other's ankles and hands, forced a cloth gag down her throat, and then tied a cloth over her mouth. *Id.* at 758. He left each woman's body to decompose in her apartment and pawned

both murders involved "depravity of mind" and were "outrageously and wantonly vile, horrible, and inhuman." *Simmons*, 955 S.W.2d at 777; *Simmons*, 815 S.W.2d at 427-428. In one case, the jury found four statutory and several nonstatutory aggravating circumstances; in the other, the jury found one statutory and eight nonstatutory aggravating circumstances. *Simmons*, 955 S.W.2d at 759; *Simmons*, 955 S.W.2d at 740.

Simmons claimed ineffective assistance of counsel during the penalty phase because "his attorneys did not introduce available mental health information or mitigating evidence in an attempt to persuade the jury to spare his life." *Simmons*, 299 F.3d at 935. Although counsel called a handful of witness to provide perfunctory testimony about their love for the defendant, no one "testified about the beatings suffered by Simmons as a child, his fear of those beatings, his father's alcoholism, his parents' violent relationship, or his victimization in [an assault in] Chicago." *Id.* at 937.

As the Eighth Circuit explained, without this mitigation evidence, "the jury was allowed to conclude that Simmons's violent behavior was simply the result of his wicked and aggressive nature." *Id.* at 936. As the Court explained, "a vivid description of Simmons's poverty stricken childhood, particularly the physical abuse, and the assault in Chicago, may have influenced the jury's assessment of his moral culpability" and could have persuaded individual jury members to "vote[ ] against the imposition of the death penalty." *Id.* at 939. Despite the

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the jewelry he had stolen from them. *State* v. *Simmons*, 815 S.W.2d 426, 427-428 (Mo. 1991).

"overwhelming amount of aggravating evidence that had been proffered by the state," *id.* at 938, his counsel's failure to present any evidence during the penalty phase of Simmons's traumatic and abused childhood was sufficient to "undermine [the court's] confidence in the outcome." *Id.* at 939.

Sixth Circuit. The Sixth Circuit reached the same conclusion in *Dickerson* v. *Bagley*, 453 F.3d 690 (6th Cir. 2006). There, the defendant had been sentenced to death on each of two counts of aggravated murder involving multiple aggravating elements. *Id.* at 691. At the penalty phase of the trial, the only significant mitigation evidence his counsel offered was "two mental health experts who had interviewed Dickerson for an hour and a half to determine if he was sane" and testified that he was "sane but in emotional turmoil." *Id.* at 697. The Sixth Circuit held his counsel's performance deficient for failing to investigate and present mitigation evidence related to Dickerson's family background and his mental health, including that he had a borderline personality disorder. *Id.* at 696.

The Sixth Circuit concluded that "[i]f the sentencer had also learned that Dickerson was raised in a home where his biological father denied his relationship, where he was called 'the moron,' and was surrounded by 'pimps, prostitutes, and drug dealers,' it is much more likely that the sentencer would have seriously contemplated a sentence of life imprisonment based on reduced culpability." *Id.* at 699. Although "the fact finder might still have imposed the death penalty even if all of the mitigating evidence had been revealed," the Sixth Circuit concluded that "the likelihood of a different

result is 'sufficient to undermine confidence in the outcome.'" *Id.* at 698 (citation omitted). Citing *Rompilla*, the Sixth Circuit explained that whether the jury might still have decided on the death penalty "is not the appropriate test * * * . Instead, [a court] must ask whether 'the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the petitioner's] culpability.'" *Id.* at 699 (citation omitted). Ultimately, the failure of Dickerson's counsel to conduct and present a complete and thorough mitigation case "prejudiced the outcome of the sentencing phase of his trial." *Id.*

Each of these decisions conflicts with the Eleventh Circuit's prejudice analysis. And that divergence in approach has serious implications for the fair and uniform administration of justice. The same facts here would have supported a finding of prejudice in at least the Sixth, Eight, Ninth, and Tenth Circuits (and arguably the Fourth and Fifth as well, *supra* n.7), while leaving defendants like Ferguson on death row in the Eleventh Circuit. The fair administration of capital punishment cannot arbitrarily turn on accidents of geography. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose" of the Court's certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals").

III. THE ELEVENTH CIRCUIT'S *HITCHCOCK* ANALYSIS CANNOT BE SQUARED WITH THIS COURT'S PRECEDENT.

A trial court indisputably commits constitutional error if it instructs a jury to consider only statutory mitigating factors. *Hitchcock*, 481 U.S. at 398-399.

Yet, that is exactly what happened here, as the Eleventh Circuit recognized. App. 31a, 35a. That error rendered Ferguson's death sentences invalid if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993). And because the prosecution bears the burden of establishing that a death sentence should stand despite the *Hitchcock* error, doubt as to whether there was the requisite "substantial and injurious effect" requires a ruling in the defendant's favor. *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995).

The Eleventh Circuit's conclusion that the *Hitchcock* errors did not have a substantial and injurious effect on the jury's deliberations and sentence is wrong—and in conflict with the Court's repeated emphasis on the importance of mitigating evidence, and especially mental-health evidence, in shaping a jury's assessment of moral culpability. Indeed, in *Porter*, this Court clarified that "[u]nder Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating." *Porter*, 130 S. Ct. at 454-455 (citing *Hoskins* v. *State*, 965 So. 2d 1, 17-18 (Fla. 2007) (per curiam)). And since this Court's *Eddings* decision in 1982—shortly after Ferguson's trials—it has been clear that " 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor,' " not just statutory mitigating factors. *Id.* (quoting *Eddings*, 455 U.S. at 112).

Here, however, the trial court specifically instructed the Hialeah jury *not* to consider the

evidence they heard about Ferguson's psychiatric background during his attempted insanity defense or the first-hand manifestations of his psychotic condition that they saw during trial.[10] Despite this conceded *Hitchcock* error, at least two jurors in the Hialeah case voted against the death penalty. App. 24a & n.17; *see supra* n.4. The trial court similarly instructed the Carol City jury not to consider the fact that Ferguson engaged in bizarre conduct at trial (including undressing in open court and interrupting the proceedings for irrational reasons), tried to dissuade Francois from killing the victims, and made efforts to comfort some of the victims. The Eleventh Circuit held that these constitutional errors were harmless. App. 34a.

The panel's ruling should again be reviewed and reversed. Contrary to the panel's decision, the *Hitchcock* errors had a "substantial and injurious effect or influence" on the jury's deliberation as to whether Ferguson was sufficiently morally culpable to warrant a death sentence. The jury's ability to consider the mental-health evidence, in particular, was limited to "the high standards required to meet" the statutory mitigating factors of "*extreme* mental or emotional disturbance and *substantial* impairment." App. 33a n.24 (emphasis in original) (citing *Booker* v. *Dugger*, 922 F.2d 633, 636 (11th Cir. 1991) (commenting on the difficulty in meeting these standards). As a result, the jury was precluded from considering nonstatutory mental mitigation. *See Porter*, 130 S. Ct. at 455 n.7 (recognizing that Florida

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[10] Examples of this mitigating evidence can be found at RCC 926-927, 1034-35, 1079-81; RH 378, 476-477, 481, 949, 958, 963, 967, 1003-04, 1036; R.1742, 1749-50, 3156.

permits a defendant to present both statutory and nonstatutory mental mitigation evidence). That sort of mental-health evidence, however, is among the mitigation evidence that resonates most strongly with jurors. *See Porter*, 130 S. Ct. at 454; *Wiggins*, 539 U.S. at 535.

The flaw in the Eleventh Circuit's decision is that, as in *Porter*, it is not "reasonable to discount entirely the effect that [nonstatutory mitigating] testimony might have had on the jury or the sentencing judge," had either considered it. *Porter*, 130 S. Ct. at 455. The panel's view that the *Hitchcock* errors were harmless because the juries found "multiple" or "numerous" aggravating factors employs the same deficient analysis that the panel adopted in its ineffective-assistance-of-counsel ruling. App. 34a-35a, 38a. Determining the influence or effect of a *Hitchcock* error is not a finger-counting exercise comparing the number of aggravating factors to the number of non-statutory mitigating factors the jury was instructed not to consider. Rather, the standard looks at the qualitative impact of the missing evidence on the assessment of moral culpability. *See Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (holding that "[t]he inquiry cannot be merely whether there was enough to support the result" in the absence of the error). In assessing the error's impact, "it is not the [reviewing] court's function * * * to speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* at 763. Instead, so long as the error may have "substantial[ly] influence[d]" the jury's assessment of Ferguson's moral culpability in sentencing him to death, or if there is "grave doubt" as to the influence, then the death sentence "cannot stand." *O'Neal*, 513

U.S. at 437. The Court has also made clear that "uncertain[ty]" about the influence should be treated "as if it affected the verdict." *Id.* Because the Eleventh Circuit's decision failed to recognize the effect of nonstatutory mental-health mitigation evidence in direct conflict with this Court's precedents, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-13595

D. C. Docket No. 95-00573-CV-DTKH

JOHN ERROL FERGUSON,
and DOROTHY FERGUSON,
individually and as Next
Friend on behalf of
JOHN ERROL FERGUSON,

Petitioners-Appellants,

versus

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS, Walter A. McNeil,

Respondent-Appellee.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 26, 2009
THOMAS K. KAHN
CLERK

No. 05-13877

D. C. Docket No. 95-00573-CV-DTKH

JOHN ERROL FERGUSON, and
DOROTHY FERGUSON, individually
and as Next Friend on behalf of
JOHN ERROL FERGUSON,

Petitioners-Appellees,

versus

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS, Walter A. McNeil,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 26, 2009)

Before BIRCH, WILSON and PRYOR, Circuit Judges.

BIRCH, Circuit Judge:

John Errol Ferguson ("Ferguson"), a Florida prisoner convicted of murder and sentenced to death, filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254 in which he made at least eleven claims. He also moved to stay the federal habeas proceedings based on his alleged incompetency, a motion denied by the district court, which held an

evidentiary hearing on the issue and found him competent to proceed with the petition. The court subsequently denied Ferguson's petition in its entirety, but granted a certificate of appealability ("COA") on all of the issues raised therein. Ferguson has appealed the district court's dismissal of nine of his claims and also challenges that court's denial of his motion to stay the proceedings. The State of Florida filed a cross-appeal regarding the district court's decision to hold an evidentiary hearing on the issue of Ferguson's competency. After thoroughly reviewing the record and the parties' briefs and hearing oral argument, we AFFIRM the district court's denial of Ferguson's petition and motion to stay.

I. BACKGROUND

A. Factual Background

Ferguson received the death penalty in two Florida state cases in which he was convicted of a total of eight counts of first-degree murder. Six of those counts stemmed from his first trial, which dealt with events that took place in Carol City, Florida in July 1977. The second trial, which involved the other two murder counts, addressed crimes occurring in Hialeah, Florida in January 1978.

1. The Carol City Murders[1]

On the evening of 27 July 1977, Ferguson, posing as a Florida Power and Light employee, received permission from Margaret Wooden to enter her home. After checking several rooms, he drew a gun, tied and blindfolded her, and let into the house two men who joined him in looking for drugs and money. About two hours later, six of Wooden's friends, including the homeowner, Livingston Stocker, came to the house and were searched, tied, and blindfolded by Ferguson and his accomplices. Shortly thereafter, Wooden's boyfriend, Michael Miller, entered the house and also was bound and searched. Miller and Wooden eventually were placed in the bedroom, and the six other bound friends were in the living room.

At some point, a mask on one of Ferguson's friends fell and revealed his face. At the time, Wooden and Miller were kneeling on the floor with their upper bodies sprawled across the bed. Wooden heard shots from the living room, saw a pillow coming toward her head, and then was shot. She witnessed Miller being fatally shot as well. Wooden did not see the shooter, though she did hear Ferguson run out of the room. She managed to escape and ran to a neighbor's house to call the police. When the police arrived, they found six dead bodies, all of whom had their hands tied behind their backs and had been shot in the

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[1] The parties do not dispute the facts and procedural background of these two cases. Our summary of the relevant facts is derived from the Florida Supreme Court's opinions on direct appeal. See Ferguson v. State, 417 So. 2d 639, 640–41 (Fla. 1982) (Ferguson I) (Carol City murders); Ferguson v. State, 417 So. 2d 631, 633 (Fla. 1982) (Ferguson II) (Hialeah murders).

back of the head. Only two of the victims, Wooden and Johnnie Hall, survived. Hall testified at Ferguson's trial about the methodical execution of the other victims.

2. The Hialeah Murders

On the evening of 8 January 1978, Brian Glenfeld and Belinda Worley, both seventeen, left a Youth-for-Christ meeting in Hialeah, Florida. They were supposed to meet friends at an ice cream parlor, but never arrived. The next morning, two passersby discovered their bodies in a nearby wooded area. Glenfeld had been killed by a bullet to the head and also had been shot in the chest and arm. Worley was found several hundred yards away under a dense growth. All of her clothes, except for her jeans, were next to her body, and she had been shot in the back of the head. An autopsy revealed that she had been raped. At trial, there was testimony that she had been wearing jewelry, but none was found with the bodies. The cash from Glenfeld's wallet, which was found in Worley's purse near her body, also had been removed.

On 5 April 1978, police arrested Ferguson at his apartment pursuant to a warrant for unlawful flight to avoid prosecution in connection with the Carol City murders. At the time of his arrest, police found in his possession a .357 magnum, which was capable of firing .38 caliber bullets, the same kind used to kill Glenfeld and Worley. The gun was registered to Stocker, one of the victims in the Carol City murders. At some point after Ferguson's arrest, he confessed to killing "the two kids," i.e., Glenfeld and Worley.

B. Procedural Background

1. Trials and Direct Appeals

Ferguson was indicted in July 1977 for, inter alia, six counts of first-degree murder in connection with the Carol City murders, and in January 1978 for, inter alia, two counts of first-degree murder in connection with the Hialeah murders. He was not incarcerated until his arrest for the Hialeah murders. Both cases went to trial in the Circuit Court for the Eleventh Judicial Circuit of Florida and were presided over by the same judge. Ferguson was tried alone for the Carol City murders and convicted on all counts, except for one of the armed robbery counts. After an advisory sentencing hearing, the jury recommended death. The judge followed the jury's recommendation and imposed six death sentences, along with two consecutive sentences of thirty years of imprisonment for the attempted murders of Hall and Woodson and three sentences of life imprisonment for attempted robberies of three of the victims. At the Hialeah trial, Ferguson mounted an unsuccessful insanity defense and was convicted on two counts of first-degree murder. The jury recommended the death penalty, and the judge imposed two death sentences.

In separate opinions on direct appeal, the Florida Supreme Court affirmed all of the convictions in both cases but vacated and remanded the death sentences due to sentencing errors. With respect to the Carol City case, the court found that the trial judge had relied on improper aggravating factors. For the Hialeah trial, the court found that the judge had not considered statutory mitigating factors. The Florida Supreme Court noted in both cases that an

additional jury sentence advisory verdict would be unnecessary on remand.

A different judge heard the cases on remand because the original trial judge had left the bench in the interim. Without holding an evidentiary hearing or impaneling a jury to make recommendations, the presiding judge imposed eight death sentences for the murders in the two cases. The Florida Supreme Court affirmed those sentences in a consolidated appeal. See Ferguson v. State, 474 So. 2d 208 (Fla. 1985) (Ferguson III).

2. Florida Post-Conviction & Habeas Proceedings

In October 1987, Ferguson and his mother, Dorothy Ferguson, acting as next friend, filed a timely motion for post-conviction relief, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which set forth six claims. For the purposes of this appeal, the relevant claims were an ineffective assistance of counsel ("IAC") claim based on trial counsel's failure to investigate and present evidence with respect to statutory mitigating factors and a Hitchcock[2] claim based on the trial court's jury instructions regarding mitigating factors. Shortly thereafter, Ferguson moved to stay the proceedings on the grounds that he was incompetent to participate in them or to assist counsel by answering questions. The circuit court denied this motion in February 1989.

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[2] In Hitchcock v. Dugger, 481 U.S. 393, 398–99, 107 S. Ct. 1821, 1824 (1987), the Supreme Court found unconstitutional instructions to the jury that indicated that the jury could not consider non-statutory mitigating circumstances.

Ferguson's counsel subsequently moved to disqualify the post-conviction judge based on ex parte contacts between the judge and the prosecutors. The circuit court denied this motion because it was untimely, was not in compliance with Florida procedural requirements, and did not provide an adequate factual foundation for the belief that the judge would be prejudiced against Ferguson. Ferguson's counsel then filed a petition for a writ of prohibition based on ex parte contacts between the judge and the prosecutors. The Florida Supreme Court denied this petition and the United States Supreme Court denied the subsequent petition for a writ of certiorari on the issue. See Ferguson v. Snyder, 493 U.S. 945, 110 S. Ct. 354 (1989) (mem.) (Snyder I); Ferguson v. Snyder, 548 So. 2d 662 (Fla. 1989) (table) (Snyder II).

In September 1989, Ferguson filed a supplement to his 3.850 petition, in which he raised ten claims, including a claim regarding racially discriminatory peremptory challenges and a Brady[3] claim regarding improper prosecutorial withholding of evidence. In response to a motion by the State, the circuit court struck many of the claims in Ferguson's original and supplemental petitions, including his peremptory

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[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), "places an affirmative duty upon the state to reveal any 'material' evidence in its possession that would tend to exculpate a defendant." Breedlove v. Moore, 279 F.3d 952, 961 (11th Cir. 2002) (Breedlove I) (quotation marks and citation omitted). Under Brady, a state would violate due process if it did not disclose materially exculpatory information in its possession, even if it acted in good faith. See id.

challenge claim. [4] The circuit court held an evidentiary hearing in May 1990 on the remaining claims and issued an order the following month denying the remainder of Ferguson's 3.850 motion. One month later, Ferguson moved to supplement his 3.850 petition with an additional ground for relief based on the State's failure to correct false testimony presented at the sentencing phase of the Carol City trial. The circuit court dismissed this motion as untimely. On appeal, the Florida Supreme Court affirmed the circuit court's denial of the 3.850 motion. See Ferguson v. State, 593 So. 2d 508, 513 (Fla. 1992) (Ferguson IV).

Ferguson also petitioned the Florida Supreme Court for a writ of habeas corpus around the same time, which the court denied. See Ferguson v. Singletary, 632 So. 2d 53, 59 (Fla. 1993) (Ferguson V). In his petition, he raised four claims, only one of which is relevant for this appeal — that he was resentenced without impaneling a new jury or holding an evidentiary hearing. The Florida Supreme Court found that Ferguson had failed to preserve this issue before the circuit court and thus was procedurally barred from raising it in his petition.

3. Federal Habeas Proceedings

Ferguson, along with his mother as next friend, filed his first federal habeas petition, the subject of this action, in the United States District Court for

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[4] The court also struck a Hitchcock claim Ferguson made in his supplemental motion, part of which addressed the issue of whether the resentencing court erred by not impaneling a new jury.

the Northern District of Florida in March 1995. He concurrently moved to stay the federal habeas proceedings due to his alleged incompetence, a motion which the district court denied in March 1999. In July 1999, Ferguson filed a motion in the Florida Circuit Court seeking to reinstate several of the claims he raised in his 3.850 motion. He based his motion on Carter v. State, 706 So. 2d 873 (Fla. 1997) (per curiam), which required courts to hold competency hearings in post-conviction proceedings when certain circumstances are present. Ferguson asserted that this constituted a fundamental change in the law and, as a result, applied retroactively. The circuit court denied his motion, and the Florida Supreme Court affirmed. See Ferguson v. State, 789 So. 2d 306, 315 (Fla. 2001) (Ferguson VI). The latter found that Carter applied retroactively but concluded that the circuit court did not abuse its discretion in finding Ferguson competent to proceed with his 3.850 petition.

In anticipation of filing the motion to reinstate his 3.850 claims, Ferguson asked the federal district court in July 1999 to stay the proceedings so that he could exhaust state remedies. The district court granted the stay in May 2000, which it lifted in August 2001. As part of the latter order, the court permitted Ferguson to filed an amended habeas petition to address changes in both the law and his mental state. In August 2003, the district court again granted him leave to file an amended petition to reflect changes in the law.[5] Ferguson filed a

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[5] During the period between these last two orders, the district judge originally presiding over this case died and

second amended petition a month later and also moved to stay the proceedings because of his alleged incompetence.

In July 2004, the district court scheduled an evidentiary hearing to determine whether Ferguson was competent to assist counsel in the habeas proceedings. A five-day hearing was held in December 2004, at which six expert witnesses testified regarding Ferguson's mental state. On 19 May 2005, the district court issued an order finding Ferguson competent to proceed and denying the motion to stay the proceedings. That same day, the court also issued an order denying Ferguson's second amended habeas petition. Ferguson appealed both of these decisions, and the State cross-appealed the district court's decision to grant an evidentiary hearing. The district court granted Ferguson's motion for a COA "in its entirety" for the reasons articulated in Miller-El v. Cockrell, 537 U.S. 322, 338, 123 S. Ct. 1029, 1040 (2003). R4-113.

II. DISCUSSION

On appeal, Ferguson asserts that the district court erred in denying nine claims in his habeas petition relating to various aspects of his trial, resentencing, and state post-conviction proceedings. He also maintains that the court, in finding him competent to proceed with his federal habeas claim and denying his motion to stay, violated his right not to proceed while incompetent. The State, in its cross-appeal, argues that the district court improperly held an

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was replaced by the judge who ultimately denied the petition.

evidentiary hearing to determine Ferguson's competency. We address these issues in turn.

A. Legal Standards Applicable to This Appeal

Because Ferguson filed his petition in 1995, one year prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we apply pre-AEDPA law to his claim. See Lindh v. Murphy, 521 U.S. 320, 326–27, 336, 117 S. Ct. 2059, 2063, 2068 (1997). However, since he initiated this appeal after the effective date of AEDPA, all questions of appellate procedure are governed by post-AEDPA law. See Slack v. McDaniel, 529 U.S. 473, 481–82, 120 S. Ct. 1595, 1602–03 (2000).

"When reviewing the district court's denial of a habeas petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error." Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000) (per curiam). A state court's findings of fact are entitled to a presumption of correctness, unless one of the exceptions discussed in § 2254(d) would be applicable.[6] See Hardwick v.

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[6] No presumption of correctness is accorded where: (1) the merits of a factual dispute were not resolved in a state court hearing; (2) the state court's factfinding procedure was inadequate to afford a full and fair hearing; (3) the material facts were not developed adequately during the state court hearing; (4) the state court lacked jurisdiction over the subject matter or applicant; (5) the state court failed to provide counsel to an indigent applicant; (6) the applicant "did not receive a full, fair, and adequate hearing in the State court proceeding;" (7) "the applicant was otherwise denied due process of law in the State court proceeding;" (8) the record considered as a whole does not fairly support the factual determination. 28 U.S.C. § 2254(d) (1995 ed.).

Crosby, 320 F.3d 1127, 1158 (11th Cir. 2003). We also do not consider issues or arguments raised for the first time on appeal. See Nyland, 216 F.3d at 1266.

We "may not consider claims that have been defaulted in state court pursuant to an adequate and independent state procedural rule, unless the petitioner can show cause for the default and resulting prejudice, or a fundamental miscarriage of justice." Zeigler v. Crosby, 345 F.3d 1300, 1304 (11th Cir. 2003) (per curiam) (quotation marks and citation omitted). A claim also would be "procedurally defaulted if the petitioner fails to raise the claim in state court and it is clear from state law that any future attempts at exhaustion would be futile." Id. (quotation marks and citation omitted). We defer to the state court's findings regarding procedural default. See id.

We review the decision to grant or deny an evidentiary hearing for abuse of discretion. See Kelley v. Secretary for the Dep't of Corr., 377 F.3d 1317, 1333 (11th Cir. 2004). For pre-AEDPA suits, we have held that a district court must hold an evidentiary hearing if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not

> afford the habeas applicant a full and fair fact hearing.

Id. at 1334 (quotation marks and citation omitted).

B. Ineffective Assistance of Counsel During Penalty Phase

Ferguson asserts that he was denied the effective assistance of counsel during the sentencing phase of both of his trials because his attorneys failed to investigate and present mitigating evidence regarding his family background and history of mental illness. He contends that his counsel failed to pursue all such evidence that reasonably could have been obtained and thus did not conduct the kind of reasonable investigation contemplated in Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). He maintains that this failure was highly prejudicial because of the compelling nature of the undiscovered mitigating evidence.

Ferguson cites a number of relevant facts of which his attorneys were not aware: that he was raised in extreme poverty and had no running water or electricity at times; that he had an alcoholic father who died when Ferguson was thirteen years old, that he had to deal with his mother's abusive boyfriends; and that, at age twenty-one, he was shot four times and almost killed by a police officer. He also asserts that he repeatedly was diagnosed as suffering from paranoid schizophrenia, was placed in multiple mental hospitals during the late 1960s and early 1970s, was twice found not guilty by reason of insanity, and was examined by multiple doctors in the years preceding the Carol City and Hialeah

murders, all of whom diagnosed him as schizophrenic, psychotic, or hallucinating.

We analyze IAC claims under the two-prong test established in Strickland, which requires us first to determine whether counsel's performance "fell below an objective standard of reasonableness" and then to decide whether this deficient representation prejudiced the petitioner's defense. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. In assessing the first prong of the Strickland test, we apply a "strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." Williams v. Allen, 542 F.3d 1326, 1337 (11th Cir. 2008) (quotation marks and citation omitted). For an attorney's performance to be unreasonable, it must fall "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. We have noted that an attorney's duty to conduct a reasonable investigation includes looking at a defendant's background for possible mitigating evidence. See Williams, 542 F.3d at 1337. Though "[t]his duty does not necessarily require counsel to investigate every evidentiary lead," an attorney's "decision to limit an investigation must flow from an informed judgment." Id. (quotation marks and citation omitted). As a result, when evaluating the reasonableness of an attorney's investigation we "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527, 123 S. Ct. at 2538.

With respect to the prejudice prong of the Strickland test, we focus on whether the petitioner

has established "that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. For a probability to be "reasonable" it must be "sufficient to undermine confidence in the outcome" of the proceeding. Id. at 694, 104 S. Ct. at 2068. We must consider the totality of the evidence to determine whether the petitioner was prejudiced by counsel's errors. See Williams, 542 F.3d at 1342.

1. The Carol City Trial

Ferguson maintains that the performance of his counsel in the Carol City case, Fred Robbins, was deficient because Robbins conducted an inadequate investigation into potential mitigating evidence regarding Ferguson's mental history and family background. According to Ferguson, Robbins's mental health investigation consisted solely of reading four reports, written in 1978, that discussed Ferguson's competence to stand trial. Those reports noted that Ferguson had undergone psychiatric examinations during the early 1970s; however, Robbins did not attempt to locate records from those examinations. Additionally, Robbins did not examine Ferguson's criminal records, which would have shown that Ferguson twice had been found not guilty of various crimes for reason of insanity. Ferguson contends that Robbins's family history investigation was equally unreasonable. Robbins spoke with Ferguson's mother and sister but never asked them about his upbringing, and Robbins's conversation with Ferguson's sister addressed only Robbins's potential retention as counsel. Robbins also apparently made no attempt to locate public records

about Ferguson or to contact his siblings, even though they lived nearby.[7]

The Florida Supreme Court rejected this claim during the 3.850 proceedings. The court noted that, although Robbins had "not exhaust[ed] all available sources of information . . ., this was not a case in which the attorney conducted only minimal investigation." Ferguson IV, 593 So. 2d at 510. It found that Robbins was aware of Ferguson's mental history and made the tactical decision not to call as witnesses those doctors who had investigated Ferguson. The court found this strategy to be reasonable since presenting such evidence could have opened the door to damaging rebuttal evidence from the State, i.e., that Ferguson had sociopathic tendencies and was exaggerating his symptoms. It therefore concluded that Ferguson had not satisfied his burden of showing either deficient performance or prejudice under the Strickland test. See id. at 511–12.

The district court reached the same conclusion in the federal habeas proceedings. It found that Robbins had conducted some investigation into

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[7] Ferguson also notes that Robbins called just one witness during the sentencing phase, Ferguson's mother, and asked her very few questions, most of which were unilluminating. The transcript of her testimony, which covers less than three pages, confirms this description. She provided very basic background information on Ferguson (i.e., his employment and interests at the time of the Carol City murders), noted that he had always been a good son to her, and confirmed that he had mental problems and had been in a mental hospital, but did not elaborate on the latter two points.

Ferguson's history of mental illness and, based on that investigation, made "a reasonable tactical decision . . . to avoid potentially greater prejudice from damaging information that would have been introduced to the jury regarding [Ferguson's] malingering and anti-social personality disorder." R4-108 at 32. The court likewise found that the Robbins had conducted a "reasonable investigation into [Ferguson's] background" and made a "reasonable tactical decision" in light of this investigation to focus on creating lingering doubt about his guilt. Id. It also determined that, even if the investigation was unreasonable, any failure in that regard would not undermine confidence in the outcome of the proceedings given the overwhelming aggravating factors involved. The court therefore concluded that Ferguson had not met the second prong of the Strickland test.[8]

Even assuming arguendo that Robbins's performance was deficient, Ferguson has not shown prejudice resulting from that deficient performance. The resentencing judge found five aggravating circumstances in this case: (1) Ferguson previously had been convicted of "three felonies involving the use of, or threat of, violence to some person[9];" (2) the murders were committed while Ferguson "was engaged in the commission of multiple robberies;" (3) the murders were committed "for the purpose of

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[8] Although the district court's findings indicate that Ferguson had not met the first prong of the Strickland standard, the court never explicitly concluded that.

[9] The felonies were a 1965 conviction for assault with intent to commit rape, a 1971 conviction for robbery, and a 1976 conviction for violent resistance to a police officer.

avoiding or preventing a lawful arrest;" (4) the murders were "especially heinous, atrocious and cruel;" and (5) the crimes involved homicides "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." [10] App. MM, Vol. 3 at 1–6. [11] By comparison, the only possible mitigating

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[10] The fifth factor was addressed for the first time on resentencing, though the Florida Supreme Court found no error in the circuit court's reliance on it. The court previously had found the other four factors to be present during the direct appeal. The original trial court found two other aggravating circumstances to be present — that Ferguson committed the crimes while under a sentence of imprisonment and that, in committing the crimes, Ferguson knowingly created a great risk of death to a number of people. However, the Florida Supreme Court negated both of those findings on direct appeal.

[11] The record in this case consists of the district court filings along with the various state court filings, the majority of which were filed as exhibits to R2-53. The state court filings were subdivided into various letter-designated appendices, ranging from A to NN. Appendices A to JJ are the briefs, petitions, and opinions from those various proceedings. Appendices KK and LL are the records from the direct appeal of the Carol City and Hialeah trials, respectively. Appendix MM is the record from the resentencing, and Appendix NN the record from the state post-conviction, or 3.850, proceedings. Within this opinion, references to documents in R2-53 will refer to the appendix and page number, i.e., "App. NN at 1000." Because the pleadings and transcripts in Appendices KK, LL, and MM are collected in separately paginated volumes, references to documents in those appendices will also list the volume number, i.e., "App. MM, Vol. 1 at 4."

circumstance identified by any of the courts assessing Ferguson's case was that there was some evidence to indicate that Ferguson might have been suffering severe mental disturbance at the time of murders and that he had an impaired capacity to appreciate the criminality of his conduct.[12] All of these findings are entitled to a presumption of correctness, and the parties identify no basis for questioning this presumption. See Hardwick, 320 F.3d at 1158.

In our view, the aggravating circumstances far outweigh any mitigating factors, even taking into account the evidence that Robbins failed to uncover. The facts of this case are extreme, including multiple execution-style killings after a prolonged period in which the victims were bound and blindfolded. We agree with the resentencing court that "[t]he entire action of [Ferguson] and his co-conspirators reflects not only an absolute lack of concern for human life or dignity but also a barbaric cruelty." App. MM, Vol. 3 at 6. As a result, we do not believe it is reasonably probable that the evidence Ferguson cites would lead a jury to disregard such cruel circumstances and impose a different sentence. We thus find that Ferguson has not established prejudice from this ineffective assistance and therefore conclude that the district court correctly denied habeas relief with respect to this part of Ferguson's IAC claim.

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[12] This finding was made by the circuit court on remand and referenced in the Florida Supreme Court's opinion on appeal from resentencing. The Florida Supreme Court never adopted this finding, however, and, in fact questioned its veracity.

2. The Hialeah Trial

Ferguson also contends that his counsel's performance during the sentencing phase of the Hialeah trial was deficient. He asserts that Bruce Phelps, the attorney in charge of his penalty phase presentation, made no meaningful effort to investigate Ferguson's family history. In support of this argument, Ferguson cites Phelps's failure to discuss potential mitigating evidence with Ferguson's siblings and to recall Ferguson's mother as a witness during sentencing after she broke down on the witness stand before he could elicit any meaningful testimony.[13] Ferguson also maintains that Phelps was deficient in not presenting evidence of Ferguson's mental illness during sentencing. Ferguson concedes that Phelps put forth mental health history evidence during the guilt phase of the trial as part of an unsuccessful insanity defense. Nevertheless, Ferguson contends that Phelps had a responsibility to recall the mental health experts so they could speak directly to the statutory mitigating factors because of the inherent difference between those factors and the requirements needed to make out an insanity defense. Furthermore, Ferguson maintains that this deficiency prejudiced his case, particularly since at least two jurors voted against the death penalty, even in the absence of the missing evidence.

The Florida Supreme Court rejected Ferguson's arguments during the 3.850 proceedings, finding both that Phelps's performance had not been deficient and that there was no resulting prejudice to

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[13] Ferguson's mother was the sole witness called by the defense during sentencing.

Ferguson even assuming deficiency. The court noted that, although Phelps failed to present any mitigating evidence regarding Ferguson's mental history during the penalty phase, it was reasonable to assume that there would have been no net benefit to presenting more mental health evidence since there already had been testimony about Ferguson's mental health during the guilt phase. The court also noted that Phelps had spoken with family members and found that his failure to recall Ferguson's mother was "reasonable in light of her emotional state." Ferguson IV, 593 So. 2d at 511.

The district court in the federal habeas proceedings reached a similar conclusion. It found that Ferguson's counsel made a "tactical decision to focus on mental health mitigators during sentencing[] and to appeal to the jury's sense of sympathy for [Ferguson's] mental health condition." R4-108 at 34. The court deemed it reasonable, in light of this trial strategy, for Ferguson's counsel not to recall his mother or to reintroduce potentially duplicative mental health evidence during the penalty phase of the trial. In addition, the court noted that there was no reasonable probability that any juror would find that the unpresented mitigating evidence outweighed the "overwhelming aggravating factors" present in the case.[14] Id. at 35.

As in the Carol City trial, even if we assume that Ferguson's Hialeah trial counsel was deficient during

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[14] As with the district court's ruling on IAC in the Carol City case, it made no explicit finding that Ferguson had not met the first Strickland prong, although the cited evidence would indicate that it tacitly reached that conclusion.

the penalty phase, it is not reasonably probable that the jury would have imposed a different sentence had they considered the missing mitigation evidence. On resentencing, the circuit court found six aggravating factors: (1) Ferguson previously had been convicted of four felonies involving the use or threat of violence[15]; (2) the murders occurred while Ferguson was "engaged in the commission of rape and robbery;" (3) the murders were committed to avoid a lawful arrest; (4) the murders were "committed for pecuniary gain;" (5) the murders were "especially heinous, atrocious, and cruel;" and (6) Ferguson's crimes were committed "in a cold, calculated, and premediated manner without any pretense of moral or legal justification."[16] App. MM, Vol. 3 at 13–16. The only potential mitigating factor the court identified was that Ferguson might have been suffering from extreme mental disturbance and been impaired in his ability to appreciate the criminality of his conduct.

We find that the aggravating factors significantly outweighed any mitigating evidence, including that which was not presented to the jury. The facts of the

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[15] These are the three felonies described supra n.10, along with the Carol City murders.

[16] As in the Carol City case, the "cold, calculated, and premeditated" factor was addressed for the first time on resentencing, though the Florida Supreme Court found no error in the circuit court's reliance on it. The original trial court also found a fifth aggravating factor, that Ferguson committed the crimes while under a sentence of imprisonment; however, the Florida Supreme Court overturned this finding since he was not confined in prison at the time and was not supposed to be.

Hialeah murders are just as cruel and shocking as those of the Carol City killings. One of the victims, Worley, suffered extreme physical abuse, including being apparently raped, prior to being shot in the head and left partially nude by the roadside. The other victim, Glenfeld, was shot twice, both before and after Worley had been sexually assaulted, and murdered. Admittedly, at least two jurors decided not to impose the death penalty even in the face of such circumstances.[17] Nevertheless, the missing evidence likely would not have changed the outcome. Notably, most of the evidence regarding Ferguson's medical background already had been presented during the guilt phase of the trial, so the jury considered that evidence in sentencing him to death. The missing evidence thus primarily involved Ferguson's family history. Although it is possible that evidence of Ferguson's mental history might have caused some jurors to recommend a sentence rather than death, we do not find that this was reasonably probable given the wealth of aggravating circumstances. See Parker v. Secretary for the Dep't of Corr., 331 F.3d 764, 783 & n.16 (11th Cir. 2003) (noting that the proper standard of review is "whether the jury's failure to hear the mitigating evidence undermines the confidence in its verdict, thus demonstrating a reasonable probability of a

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[17] The actual number of jurors voting against the death penalty is unknown. At trial, the court began polling the jurors to confirm that the majority of the jury had voted to sentence Ferguson to death. Two of the jurors misunderstood and indicated that they personally had voted against a sentence of death; however, the court corrected this erroneous assumption before other jurors had an opportunity to signal their vote.

different result" rather than whether the result "would have been different absent the deficient performance") (alterations, quotation marks, and citation omitted). Accordingly, we find that Ferguson has not met the prejudice prong and conclude that the district court correctly denied Ferguson habeas relief with respect to his IAC claim regarding the penalty phase of the Hialeah trial.[18]

C. *Hitchcock* Error

Ferguson contends that the judge's instructions to the jury at both the Hialeah and Carol City trials limited the jury's ability to consider non-statutory mitigating factors, in violation of Hitchcock. He maintains that such limitation thus denied him a fair sentencing in both cases. This claim requires us to determine first whether a Hitchcock error occurred and then whether any such error was harmless.

We have noted that, "[a]lthough whether a Hitchcock error occurred is a legal question, it is almost entirely dependent upon the answer to a question of fact: did the sentencing judge consider any and all nonstatutory mitigating circumstance evidence that was presented to him?" Quince v. Crosby, 360 F.3d 1259, 1266 (11th Cir. 2004) (quotation marks and citation omitted). Accordingly, we have deemed statements by the Florida Supreme

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[18] Ferguson also requests an evidentiary hearing on the IAC issue because the record did not support the state courts' factual determinations regarding the strategic intent of counsel in both cases. See Kelley, 377 F.3d at 1334. In this case, the record provides a sufficient basis for the state courts' findings and an evidentiary hearing would be unnecessary.

Court "that the sentencing judge did not limit his consideration to only statutory mitigating circumstances" to be findings of fact that, for pre-AEDPA cases, should be upheld if it "is fairly supported by the record." Id. at 1267. Ferguson asserts that this standard is inapplicable here, because the issue is whether the jury, not the judge, limited its consideration to statutory mitigating factors, a question for which there would be no factual basis because the jury does not make written findings of fact. He suggests that we instead are analyzing the propriety of jury instructions, which would be a question of law subject to de novo review. See United States v. Drury, 396 F.3d 1303, 1313 (11th Cir. 2005).

We believe the correct approach is to treat Ferguson's claim as raising a mixed question of law and fact. The validity of the jury instructions under Hitchcock would be a legal question. However, determining what the jury relied on in sentencing Ferguson entails a factual inquiry looking solely at the text of the instructions. Admittedly, since the jury does not have to make written findings, we cannot say for certain whether jurors actually limited their consideration to statutory mitigating factors. Nevertheless, we deem it appropriate to assume that, in sentencing Ferguson, the jury followed the court's instructions and that, as a factual matter, the scope of its analysis would reflect how a reasonable person would view the instructions. See United States v. Siegelman, 561 F.3d 1215, 1239 (11th Cir. 2009) (per curiam) ("The jury is presumed to follow the district court's instructions."). We therefore evaluate de novo the issue of whether a Hitchcock error occurred. See Nyland, 216 F.3d at

1266. In so doing, we must examine the totality of the circumstances in which the instructions were given. See Card v. Dugger, 911 F.2d 1494, 1522 (11th Cir. 1990).

Even if we find a Hitchcock error to have occurred here, we can still deny Ferguson's claims if we determine that the error was harmless. Whether an error was harmless is a mixed question of law and fact that we review de novo. See Smith v. Singletary, 61 F.3d 815, 817 (11th Cir. 1995) (per curiam). For Hitchcock errors, we apply the harmlessness standard articulated in Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993).[19] See Sims v. Singletary, 155 F.3d 1297, 1315 (11th Cir. 1998). In so doing, we focus on "whether the error had substantial and injurious effect or influence in determining the jury's verdict." Id. (quotation marks and citations omitted). For the error not to have been harmless, there must be "more than a reasonable possibility that the error contributed to the sentence." Horsley v. State of Ala., 45 F.3d 1486, 1493 (11th Cir. 1995).

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[19] The district court appears to have evaluated harmless error under the standard articulated in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967), i.e., whether an error was "harmless beyond a reasonable doubt." See Sims, 155 F.3d at 1315 (quotation marks and citation omitted). However, in Brecht, the Court concluded that the Chapman standard did not apply to habeas review, and instead substituted the "substantial and injurious effect" test. See id. (quotation marks and citation omitted).

1. The Carol City Trial

At the beginning of the sentencing phase of the Carol City trial, the judge told the members of the jury that he later would instruct them as to the mitigation factors that they "may consider." App. KK, Vol. 4 at 1023. After closing arguments, he stated that "[t]he mitigating circumstances you may consider, if established by the evidence, are these" and then listed the statutory mitigating factors. Id. at 1074–75. He then described the standard of proof for aggravating factors and told the jurors that, although they were limited to considering only the aggravating circumstances he had listed, there was "no such limitation upon the mitigating factors" that could be considered. Id. at 1075.

Ferguson contends that he was denied a fair sentencing at the trial because these instructions unconstitutionally precluded the jury from considering non-statutory mitigating evidence in deciding whether to impose the death penalty, in violation of Hitchcock. He asserts that any error from the court's earlier instructions was not cured by the judge's later statement indicating that there was no limitation on the mitigating factors. In addition, Ferguson notes that the prosecutor made comments during closing arguments that could be interpreted as supporting the notion that only statutory mitigating factors could be considered.[20]

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[20] Prior to the judge's instructions, the prosecutor told the jury that "the Court has enumerated what mitigating factors should apply in this case . . ., and you are bound by this law, and the judge will tell you so." App. KK, Vol. 4 at 1060. The prosecutor then described the statutory mitigating factors and stated, "Those are the

Both the state courts and district court rejected this claim. In the 3.850 proceedings, the Florida Supreme Court found that there had been no Hitchcock error because the trial judge's later instruction "clearly" informed the jurors "that they were not limited to consideration of the statutory mitigating circumstances." Ferguson IV, 593 So. 2d at 512. Because it made this finding, the court did not address the issue of harmless error. On federal habeas review, the district court determined that the Florida Supreme Court's statements regarding whether the sentencing judge limited consideration to statutory mitigating factors constituted findings of fact. Since the record supported the Florida Supreme Court's finding that there had not been such a limitation in the Carol City trial, the court denied Ferguson's claim. Neither the Florida Supreme nor the federal district court addressed the issue of harmless error.[21]

Ferguson maintains that the court's instructions were contradictory and that the court made no effort to indicate which instruction should control or to explain the discrepancy in its statements. He cites Hall v. Kelso, 892 F.2d 1541, 1545 (11th Cir. 1990), for the principle that a later, correct instruction

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circumstances that you have to consider, and if those circumstances apply in this case, you must follow the law." Id. at 1062.

[21] The circuit court in the 3.850 proceedings found both that there had been no Hitchcock error and that, even if there had been such an error, it was harmless because the non-statutory mitigating evidence was insignificant in comparison to the overwhelming aggravating circumstances.

cannot cure an earlier, contradictory instruction in the absence of a clarifying statement by the court. It could be argued that the court's instructions were more complementary than contradictory, which would make Hall inapplicable here. Under this reading, the court's initial instruction merely would indicate that jurors could consider the statutory factors described thereafter instead of limiting the jury's inquiry to solely those factors. The later instruction would inform the jurors that they could consider any non-statutory mitigating factors as well, and thus would have added to the more restrained scope of inquiry suggested by the earlier instruction. [22] Any infirmities in the initial instruction thus would have been cured by the court's subsequent statement.

Nevertheless there are good reasons for declining to adopt that reading. The court's initial instruction, on its own, clearly would have limited the jury's consideration to statutory factors and thus violated Hitchcock. See Jones v. Dugger, 867 F.2d 1277, 1279 (11th Cir. 1989) (finding Hitchcock error with respect

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[22] In Sims, we found no Hitchcock error based on a similar rationale. In that case, the judge told the jury, "The mitigating circumstances which you may consider if established by the evidence among others are these," and then listed the statutory mitigating factors. Sims, 155 F.3d at 1315 (quotation marks omitted). Focusing on the use of the phrase "among others," we found that this "instruction did not preclude the jury from considering all the mitigating evidence presented by defense counsel but, instead, instructed them to consider all the evidence that was presented." Id. Unlike here, though, Sims involved a single instruction rather than two separate, and potentially conflicting, instructions.

to a virtually identical instruction). Additionally, though the court made a later, non-limiting statement, this "proper instruction was not linked to the erroneous one in such a way as to explicate it or to make clear that the proper instruction was preeminent and controlling." Hall, 892 F.2d at 1545. Furthermore, the prosecutor's statements strongly suggested that the jury's consideration was limited to the statutory factors and therefore "exacerbated the impact of the court's erroneous instruction." Jones, 867 F.2d at 1279 n.4. Bearing all of this in mind, we assume that there was a Hitchcock error here and thus turn to the issue of whether that error was harmless.

Ferguson contends that the Hitchcock error was not harmless due to the strength of the mitigating evidence the jury did not consider as a result of the error. In particular, he cites the evidence produced at trial that indicated that the murders were not premeditated, that at least five of the six murders were performed by one of his co-defendants, Marvin Francois, and that he tried to comfort some of the victims. Ferguson contends that the jury reasonably could have concluded from this evidence that he was an unwilling accomplice to Francois's actions and that he tried to stop the murders. Ferguson also mentions that the jury witnessed his strange behavior at trial, including stripping off his clothes in the courtroom, and that there was evidence at trial regarding his mental problems and prior hospitalization. Additionally, Ferguson asserts that we should consider the cumulative evidentiary effect of the various trial errors, i.e., the mitigating evidence that Robbins failed to produce due to his

ineffective assistance as well as the non-statutory mitigating evidence actually produced.

As a preliminary note, we cannot consider as part of our harmless error analysis any mitigating evidence that Robbins failed to produce. In performing the harmless error analysis for a Hitchcock claim, we "must consider both the mitigating evidence presented at sentencing as well as mitigating evidence that could have been presented, but which the state trial court prevented the petitioner from presenting." Smith, 61 F.3d at 817 (quotation marks and citation omitted). "In other words, [we] must consider all potential mitigating evidence that would have been presented, but for the Hitchcock error." Id. In this case, there is no indication that the trial court inhibited Ferguson's ability to present the missing mitigating evidence, and Ferguson identifies no case law supporting the notion that a harmless error analysis for a Hitchcock claim should examine such evidence.[23]

We thus must determine whether the non-statutory evidence Ferguson actually presented at trial, which he asserts the jury did not consider, would have substantially influenced the outcome if the jury had taken it into account. In fact, the jury may have

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[23] Although Ferguson cites three cases from our sister circuits in support of his proposition, they all involve separate claims alleging cumulative error from the effect of multiple harmless errors rather than as part of the analysis of a single harmless error issue. See Miller v. Mullin, 354 F.3d 1288, 1301 (10th Cir. 2004) (per curiam); Alcala v. Woodford, 334 F.3d 862, 893–94 (9th Cir. 2003); Anderson v. Sternes, 243 F.3d 1049, 1055 (7th Cir. 2001).

considered some of this evidence. One of the statutory mitigating circumstances included in the jury instructions was that Ferguson was an accomplice to the offense and played a relatively minor role in its commission. The jury could have viewed evidence regarding Ferguson's alleged lack of responsibility for the murders in the crime as falling under this category.[24] If this were the case, the only evidence that would have been unconsidered was that respecting the lack of premeditation, which would not be enough to alter the outcome in the face of the aggravating circumstances.

Even if we assume that the jury did not take into account any of the evidence Ferguson categorizes as non-statutory, there is good reason to believe that the evidence, had it been considered, would not have altered the outcome of the trial. Notably, we can find only one case, Smith, in which we found that a Hitchcock error was not harmless under the Brecht standard.[25] See Smith, 61 F.3d at 819. The non-

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[24] A similar argument could be made with respect to the mental illness evidence and the judge's instructions regarding lack of ability to appreciate the effect of one's actions and the commission of the offense while under mental duress. However, the jury's ability to consider that evidence would be limited by the high standards required to meet either of those factors, i.e., extreme mental or emotional disturbance and substantial impairment. See Booker v. Dugger, 922 F.2d 633, 636 (11th Cir. 1991) (commenting on the difficulty in meeting these standards).

[25] Ferguson cites various cases in which we found Hitchcock errors were not harmless; however, all of those cases were decided under more lenient harmless error standards, i.e., whether "the evidence excluded from the

statutory evidence in Smith presents a much stronger case for non-harmlessness than does that in Ferguson's. In Smith, there were at least fourteen different pieces of mitigating evidence that the jury did not consider because of the Hitchcock error. See id. at 817–18. The non-statutory mitigating evidence presented at the Carol City trial also was put forth in Smith, i.e., that the defendant did not perform the actual murders, that he was influenced by the dominant personality of an accomplice, and that he had mental difficulties — in Smith, stemming from alcohol and substance abuse. See id. However, in Smith there were a number of other mitigating factors that were not present in Ferguson's case. For instance, Smith was a minor at the time of the crime, was intoxicated and under the influence of marijuana when the murders occurred, had a non-violent personality, and suffered from epilepsy. See id. Additionally, one of Smith's accomplices, who had been found guilty of the same number of felonies as Smith, was given a life sentence rather than the death penalty. See id. at 817.

Bearing in mind this precedent, we do not believe that there is a reasonable probability that the non-statutory evidence, had it been considered by the jury, would have altered Ferguson's sentence. Although Smith involved a similar array of aggravating factors, the mitigating circumstances in that case presented a much stronger argument

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jury's sentencing deliberations by a limiting instruction could have had any effect on the jury's recommendation." Booker, 922 F.2d at 635; see also Delap v. Dugger, 890 F.2d 285, 306 (11th Cir. 1989) (finding Hitchcock error "not harmless beyond a reasonable doubt").

against a death sentence than the mitigating evidence here.[26] Additionally, as previously noted, the aggravating factors here are quite numerous and compelling. Particularly since the jury may have considered much of this mitigating evidence as part of various statutory factors, we do not believe that there was "more than a reasonable possibility that the [Hitchcock] error contributed to [Ferguson's] sentence." Horsley, 45 F.3d at 1493. Since the error thus did not have a "substantial and injurious effect or influence in determining the jury's verdict," we conclude that it was harmless and that the district court correctly denied Ferguson habeas relief for this claim. Sims, 155 F.3d at 1315 (quotation marks and citations omitted).

2. The Hialeah Trial

At the Hialeah trial, the judge's first two instructions relating to mitigating circumstances were essentially the same as those in the Carol City trial. Unlike in the Carol City proceedings, though, he made no subsequent statement informing the jurors that they were not limited in the mitigating factors they could consider. The parties concede that these instructions constituted a Hitchcock error. We therefore must decide whether this error was harmless under the Brecht standard.

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[26] Smith involved six aggravating factors: (1) that the defendant had two prior felony convictions; (2) "that he committed the murder "in the course of a kidnapping," (3) "to avoid arrest," and (4) "for pecuniary gain;" "(5) that the murder was heinous, atrocious, and cruel; and (6) that the murder was cold, calculated, and premeditated." Smith, 61 F.3d at 816.

The Florida Supreme Court rejected Ferguson's Hitchcock claim during the 3.850 proceedings.[27] It found that there had been a Hitchcock error in the Hialeah trial but concluded that the error was harmless "beyond a reasonable doubt." Ferguson IV, 593 So. 2d at 513. The court described the additional mitigating evidence presented at the 3.850 hearing, which dealt Ferguson's family history, as "relatively insignificant." Id. at 512. It then went on to note that the mitigating evidence was "especially insignificant in light of the heinous nature of the killings in this case and the overwhelming aggravating factors."[28] Id.

The district court agreed that the Hitchcock error "was harmless beyond a reasonable doubt." R4-108 at 37. In support of this conclusion, the court cited both the egregiousness of the aggravating circumstances and the fact that the jury already had discounted the non-statutory mental health evidence when it considered and rejected Ferguson's insanity defense. The court also agreed with the Florida Supreme Court that the outcome would have been the same even if the non-statutory mitigating

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[27] The circuit court in those proceedings found that the Hitchcock error was harmless beyond a reasonable doubt since the trial court had told the jury to consider all of the evidence. The trial judge instructed the jury to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." App. LL, Vol. 6 at 1463–64.

[28] It is unclear whether, in making this statement, the court was describing solely the mitigating evidence from the 3.850 hearing or all of the mitigating evidence in the case.

evidence produced at the 3.850 hearing had been taken into account.

Ferguson notes that there was a wealth of evidence produced at trial regarding his psychological problems and that he exhibited bizarre behavior during the course of the trial. He asserts that the jury did not consider this evidence in imposing sentence because his counsel presented it only in terms of an insanity defense and did not connect it to a statutory mitigating factor. As previously noted, there is a reasonable argument that the jury did not take the mental health evidence into account because of the language of the jury instructions regarding mental duress and inability to appreciate the impact of one's actions. See n.24 supra. However, the judge's instruction to consider and weigh all of the evidence may mitigate the fact that counsel did not connect the evidence to a statutory mitigating factor.

Even if we accept Ferguson's contention that the jury did not consider the evidence, we do not believe that the Hitchcock error would have changed the outcome. The evidence Ferguson cites here is essentially the same as that which he referenced with respect to the prejudice prong of his ineffective assistance claim. In fact, it may even be less since Ferguson has not identified a basis for us to take into account evidence that was not produced at trial. See Smith, 61 F.3d at 817. Since that evidence was insufficient to meet Strickland's requirement that there be a "reasonable probability" of affecting the outcome, it likewise would not be enough to show the "substantial and injurious effect or influence" on the verdict required under Brecht. Sims, 155 F.3d at 1315 (quotation marks and citations omitted). Furthermore, as in the Carol City case, it is highly

improbable that enough jurors would find that the multiple egregious aggravating factors were outweighed by this unconsidered mitigation evidence. We therefore conclude that the Hitchcock error in the Hialeah trial was harmless and that the district court properly denied Ferguson habeas relief with respect to this claim.

D. *Brady* Claim

Ferguson contends that the prosecution in both trials violated his due process rights, as described in Brady, by failing to disclose evidence that three of its witnesses, detectives Robert Derringer, Charles Zatrepalek, and Michael MacDonald ("the detectives"), were under investigation for drug trafficking, conspiracy, theft, and civil rights violations. [29] Ferguson asserts that all of the requirements to establish a Brady claim are present here and that the district court erred in failing to grant him habeas relief or, in the alternative, to hold an evidentiary hearing on the issue.[30] He contends that the State possessed evidence of the detectives' ongoing criminal conduct at the time of the trials

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[29] This conduct ultimately led to a 40-count indictment and multiple convictions for various individuals, including Derringer. See United States v. Alonso, 740 F.2d 862, 865 (11th Cir. 1984).

[30] Although the 3.850 evidentiary hearing ostensibly addressed the Brady issue among others, Ferguson contended that he could not offer a "full Brady presentation" at that time because his motion for discovery on that topic had been denied and the prosecution files to which he had access did not contain the necessary information about the arrests. App. NN at 2883.

because it had constructive, if not actual, knowledge of their illegal activities and the knowledge of the detectives could be imputed to the prosecution. He also maintains that this evidence was material because there were similarities between the charges against Ferguson and the activities in which the detectives were involved, i.e., stealing money from drug dealers and threatening to kill people. According to Ferguson, the prosecution's failure to provide this evidence undermines confidence in the verdicts because of the critical role the detectives played at trial.

The state courts rejected Ferguson's Brady claim argument during the 3.850 proceedings. The circuit court made three principal findings: (1) that evidence concerning the detectives' involvement in the illegal activities was not material under the standard articulated in United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); (2) that the State did not possess the evidence because it had no actual knowledge of the illegal activities and such knowledge could not be imputed to it; and (3) that it was not reasonably probable that the evidence, if admissible, would have changed the outcome of the proceedings. The Florida Supreme Court found the Brady claim to be without merit and dismissed it summarily.

The district court determined that Ferguson had failed to state a Brady claim. The court found that each of the circuit court's three findings could serve as an independent basis for denying Ferguson's claim. The court agreed that the evidence would have been inadmissible under Florida law and thus was not material for the purposes of assessing the claim. It found that the State did not have

possession of the impeachment evidence for the purposes of a Brady violation since it had no actual knowledge of the evidence and the prosecution's duty to inquire into such evidence would have been trumped by the detectives' Fifth Amendment rights. The court also found that the results of the proceedings would not have changed if the impeachment evidence had been presented.

For a petitioner to prevail on a Brady claim, he "must establish (1) the government possessed evidence favorable to him; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the government suppressed the favorable evidence; and (4) the evidence was material." Lamarca v. Secretary, Dep't of Corr., 568 F.3d 929, 941 (11th Cir. 2009) (quotation marks and citation omitted). Evidence would be "material" if it is reasonably probable that a different outcome would have resulted if the government had disclosed the evidence. See id. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. (quotation marks and citation omitted). Because we find that the evidence was not material for the purposes of Brady, we need not address the other prongs.

The Florida Supreme Court has held that, as a general matter, if a state witness "were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges," a defendant has the right to bring out the circumstances behind those charges on cross-examination. Reed v. State, 875 So. 2d 415, 431 (Fla. 2004) (per curiam) (quotation marks and citation omitted). However, when that "state witness is

merely under investigation," the defendant would not have this right when the investigation is either too remote in time from or not related or relevant to the case at issue. Id. In Breedlove I, we noted that "evidence of unrelated illegal activity by a police officer testifying for the state would likely not have been admissible under Florida's law of evidence, and thus immaterial for Brady purposes." Breedlove I, 279 F.3d at 964 (citing Delap, 890 F.2d at 298).

Since the detectives had not been charged at the time of Ferguson's trials, evidence of their illegal activities would have been admissible only if the investigations were related to the cases against Ferguson and were not too remote in time from his trials.[31] We thus must determine whether Ferguson has shown that there was sufficient relation between those investigations and his own case. According to Ferguson, such a connection existed because the detectives were charged with crimes that bore a resemblance to his own. In particular, he cites the fact that the detectives' crimes involved ripping off drug dealers[32] in the same location and during the same time frame as the Carol City crimes, and that these crimes involved stealing money from a private home and threats to kill people, if not actual killings. See Breedlove I, 279 F.3d at 956. He asserts that these similarities make it distinctly plausible that

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[31] Though neither party raises it as an issue, it should be noted that there is no retroactivity problem in applying these Florida precedents since there was case law at the time of the trials supporting essentially this standard. See Fulton v. State, 335 So. 2d 280, 283–84 (Fla. 1976).

[32] This was a stated purpose of the home invasion that precipitated the Carol City murders.

the detectives had a motivation to resolve Ferguson's case quickly and possibly to throw suspicion on him for their own crimes.

We addressed essentially the same argument in Breedlove I, which involved a Brady claim based on the alleged suppression of evidence regarding illegal activities by many of the same detectives who testified at Ferguson's trials. See Breedlove I, 279 F.3d at 959–64. In that case, we found it was not objectively unreasonable for the Florida Supreme Court to determine that evidence of the detectives' crimes was unrelated, and thus not material, to the case against the petitioner, who had been convicted of felony murder connected with a burglary of a house in Miami. See id. at 954–55, 963. Because Breedlove I involved a post-AEDPA inquiry into objective unreasonableness, rather than the de novo review applicable here, our holding in that case would not be binding here. See id. at 963.

Even though Breedlove I is not controlling, Ferguson has failed to provide a rationale for us to reach a different conclusion with respect to materiality. The purported connections between Ferguson's offenses and the detectives' crimes are too attenuated to meet the materiality test. The criminal scheme in which the detectives took part included a range of drug-related felonies not seen in the Carol City murders, i.e., racketeering, possession of various drugs with the intent to distribute, money counterfeiting, and tax evasion. See Alonso, 740 F.2d at 865 n.1. Additionally, the conspirators used a falsified police warrant to gain entry to the home, a modus operandi distinct from and likely unavailable to Ferguson and his compatriots during the Carol City murders. See id. at 866. The detectives also

may not have been aware of the investigations at the time of Ferguson's trials and thus would not have had a reason to implicate Ferguson for their crimes. See Breedlove v. State, 580 So. 2d 605, 607 (Fla. 1991) (Breedlove II) (per curiam). If, as Ferguson asserts, the detectives were motivated by a desire to implicate others for their crimes, he has not identified "particular facts" to indicate why the detectives would have had a reason to present false testimony in his specific case. Reed, 875 So. 2d at 431. Since Florida courts would have treated such evidence as inadmissible, it is immaterial for Brady purposes. We therefore find that Ferguson has not stated a valid Brady claim and that the district court thus properly denied Ferguson habeas relief for this claim.[33]

E. Failure to Correct False Testimony

Ferguson also asserts that his due process rights were violated by the prosecution's eliciting and failing to correct false testimony from Edward Hartmann, a police officer at the Carol City trial. Hartmann testified that Ferguson was convicted of assault with intent to commit murder based on a 1969 shooting incident with Hartmann. In fact, Hartmann shot Ferguson four times, and Ferguson was acquitted of the assault charges, though he was found guilty of robbery in connection with the same incident. Ferguson contends that the prosecutor was aware of this discrepancy and violated his due process rights by failing to correct it. See Giglio

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[33] We also note our agreement with the district court's finding that the evidence did not affect the proceedings because there was ample independent evidence to support his conviction in both cases.

v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972). He also maintains that his trial and post-conviction counsel were unaware of the error and that his own incompetence prevented him from informing them of it.

Ferguson first made this claim in a supplement to his 3.850 motion, which he filed after the circuit court already had denied his motion in full. The circuit court denied his motion to supplement, finding that the motion was untimely because it was "predicated on facts which could have been raised at an earlier time." App. NN at 1399. The Florida Supreme Court summarily denied Ferguson's appeal on this issue.

The district court found this claim to be procedurally barred under Vining v. State, 827 So. 2d 201, 212 (Fla. 2002) (per curiam), in which the Florida Supreme Court held that such claims cannot be raised for the first time in a 3.850 motion unless they involved an error that was unknown to the defendant and his counsel at the time of trial and could not be uncovered through due diligence. The district court determined that Robbins was aware of the facts of the shooting incident at the time but did not object to the testimony and that Ferguson's alleged incompetence could not provide a basis for relief since the circuit court found him competent to stand trial. The court also noted that, even assuming the claim was not procedurally barred, the false testimony amounted to harmless error.

To make out a valid Giglio claim, a petitioner "must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material — i.e., that there is any

reasonable likelihood that the false testimony could have affected the judgment." Davis v. Terry, 465 F.3d 1249, 1253 (11th Cir. 2006) (per curiam) (quotation marks, alterations, and citation omitted).

Under the then-applicable version of Rule 3.850, a defendant had to file a motion within two years of the date his conviction became final.[34] See Fla. R. Crim. P. 3.850(b) (1990). However, there was an explicit exception to this time bar if the defendant alleged that the facts upon which he based his claim were unknown to him or his attorney "and could not have been ascertained by the exercise of due diligence." Id. 3.850(b)(1). Furthermore, under that rule, a circuit court was not obligated to consider supplemental pleadings to a 3.850 motion if it had already ruled on the merits of that motion. See id. 3.850(f); State v. Green, 944 So. 2d 208, 218 (Fla. 2006). The failure to file within the time frame discussed in Rule 3.850 would procedurally bar a petitioner from bringing a federal habeas claim on that issue. See Whiddon v. Dugger, 894 F.2d 1266, 1267–68 (11th Cir. 1990).

As a preliminary matter, there may have been no Giglio violation here because the prosecutor arguably corrected the false testimony by entering into evidence Ferguson's correct conviction record, which included a reference to the not guilty verdict; however, no party called attention to the discrepancy. In any event, assuming there was a violation,

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[34] The current version of Rule 3.850 sets the time limits at two years for non-capital cases and one year for capital cases. See Fla. R. Crim. P. 3.850(b) (2009); In Re Rule of Crim. Procedure 3.85 1, 626 So. 2d 198, 199–200 (Fla. 1993) (per curiam) (discussing changes to Rule 3.850).

Ferguson's claim would be procedurally barred. The motion to supplement was filed twelve years after the completion of trial and a month after the court denied Ferguson's 3.850 motion. Ferguson's counsel contends that neither they nor any of his prior counsel had knowledge of the incorrectness of Hartmann's testimony until July 1990 when they discovered documents indicating a contrary set of events. Even if we accept these facts, and there are reasons to doubt them,[35] Ferguson has not explained why his attorneys could not have obtained evidence of the discrepancy at an earlier date. In light of the extreme time gap between trial and the filing of the motion to supplement, along with the fact that evidence of the factual discrepancy was in the trial record, we find that Ferguson has not shown that he meets the due diligence requirement for the exception to Rule 3.850's time bar. We therefore conclude that Ferguson's Giglio claim is procedurally barred.[36]

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[35] Robbins's cross-examination of Hartmann included multiple questions regarding in which parts of the body Ferguson had been shot, which indicates that he may have been aware of the basic circumstances of the incident prior to the conviction record being entered as evidence. Robbins also could have received knowledge of the events from Ferguson, who had been deemed competent to stand trial and can be assumed to have known his own criminal history, particularly after having his memory refreshed by Hartmann's testimony.

[36] We note that, even assuming that the claim was not procedurally barred, it would constitute harmless error, since the error would affect only one of the aggravating factors, Ferguson's past violent felony convictions, and

F. Jury Separation Claim

Ferguson contends that he was denied the effective assistance of appellate counsel because his counsel failed to raise on appeal the issue of the separation of the Hialeah jury during its deliberations. He first raised this argument during the state habeas proceedings, and it was rejected by the Florida Supreme Court. The court noted that such a claim would not be cognizable unless there had been a contemporaneous objection by trial counsel, assuming the judge gave the jury adequate cautionary instructions. It found that Ferguson's trial counsel failed to make such an objection and that the trial judge had instructed the jury not to discuss the case. In combination with the judge's other cautionary instructions during the trial, these facts rendered Ferguson's claim meritless. The district court agreed with the Florida Supreme Court's rationale and concluded that the failure to raise the argument would not constitute ineffective assistance of counsel.

Since Ferguson's state appellate counsel could be ineffective for not raising the jury separation claim only if that issue had been preserved for appeal, we must determine whether the issue was waived. See Rose v. Dugger, 508 So. 2d 321, 323 (Fla. 1987) (finding appellate counsel not deficient when jury separation issue was not preserved for appellate review). Under Florida law, "in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so." Livingston v.

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there would still be two violent felony convictions to trigger that factor.

State, 458 So. 2d 235, 239 (Fla. 1984); see also Fla. R. Crim. P. 3.370(c). It is per se reversible error to permit a jury to separate over an objection by defense counsel. See Pope v. State, 569 So. 2d 1241, 1243 (Fla. 1990) (per curiam). Because "this per se rule is merely prophylactic in nature," counsel must make a contemporaneous objection at trial to the separation when the court gives cautionary instructions to the jury. Id. at 1244. As a result, if defense counsel either makes no contemporaneous objection to separation or affirmatively consents to it, the error is deemed waived if "adequate cautionary instructions were given and there is no other showing that the defendant's right to a fair trial was compromised." Id. In this case, it is undisputed that defense counsel made no contemporaneous objection to the jury separation, and Ferguson does not argue that his right to a fair trial was compromised. Accordingly, the error would be waived if we find that the judge gave adequate cautionary instructions to the jury.

Throughout the course of the Hialeah trial, the judge gave the jury repeated cautionary instructions about not discussing the case with anyone and not consulting outside sources.[37] Immediately prior to the jury's beginning their deliberations, the judge instructed them as follows: "You may now retire to the jury room My earlier discussions with you about not talking about this case you can forget about and you can talk about it all you want." App. LL, Vol. 6

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[37] He typically gave the jury such instructions before the court recessed for lunch or for the day, though there were occasions in which he did not give those instructions before a break.

at 1419. The jury deliberated for a few hours and then made a request to go home for the evening, which the trial judge granted. Before they left, he gave them the following instructions:

> There are some special admonitions that, of course, I think are appropriate.
>
> The case ought to stay here. Forget about it. Relax for the evening. . . .
>
> [In the morning] I would like everybody in here ready to go by nine and I would like you to report here rather than upstairs. . . .
>
> Come directly into the courtroom. . . . Go directly into the jury room and do not discuss the case until I am with you and tell you to do so.

Id. at 1425–26.

We find the judge's cautionary instructions to be adequate, especially in light of his earlier repeated admonitions. There is scant Florida case law discussing what would constitute an adequate cautionary instruction. The most analogous case is Engle v. State, 438 So. 2d 803 (Fla. 1983) (per curiam), which involved the failure to instruct the jury, immediately before it separated for deliberations, that it was not to visit the scene of the crime. The judge in that case gave the jury such an instruction only at the beginning of the trial, which was three days before the jury separation. See id. at 809. The Florida Supreme Court found there to have been no reversible error due to the separation since the jury would have been "capable of remembering and heeding the judge's admonition not to visit the scene of the alleged crime without the necessity of

repeating the same every time that the jury separates." Id.

The logic in Engle applies equally here. The Hialeah trial judge repeatedly advised the jurors not to discuss the case when they left the courtroom, and we find it reasonable to infer that the jury kept these warnings in mind at the end of the trial. Ferguson argues that these admonitions were undermined by the instruction immediately prior to the commencement of deliberations for the jury to "forget about" the earlier warnings. However, any such subversion would have been cured by the judge's instruction immediately prior to separation that the jurors should not discuss the case until he was with them and told them they could do so. Since the instructions likely were adequate and Ferguson's counsel did not object to the separation, we find that this issue was waived. As a result, Ferguson's appellate counsel would not be ineffective for failing to raise the issue on appeal. We therefore conclude that the district court correctly denied Ferguson habeas relief with respect to this claim.

G. Resentencing by a New Judge

Ferguson also asserts that his federal due process rights were violated because he was resentenced to death by a new judge without the benefit of an evidentiary hearing. As previously noted, the trial judge who presided over both the Carol City and Hialeah trials retired during the pendency of Ferguson's appeal. After the Florida Supreme Court vacated and remanded Ferguson's death sentences, a successor judge resentenced him to death. On direct appeal from the resentencing, the Florida Supreme Court affirmed these sentences after determining that the successor judge had not abused his

discretion in denying Ferguson's request for an evidentiary hearing before resentencing. The court noted that the successor judge had found Ferguson's offer of proof insufficient to merit reopening the case to hold such a hearing.

In the state habeas proceedings, Ferguson asserted that his resentencing violated the requirement, set forth in Corbett v. State, 602 So. 2d 1240 (Fla. 1992) (per curiam), that a substitute judge who did not hear the evidence presented as part of the penalty phase of a trial "must conduct a new sentencing proceeding before a jury to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies." Corbett, 602 So. 2d at 1244. The Florida Supreme Court concluded that, although the holding in Corbett applied to resentencings, it did not apply retroactively since it was not a fundamental constitutional change in the law. The court also found that Ferguson had not preserved the issue and that, as a result, his claim was procedurally barred. This procedural bar applied because, although Ferguson had requested an evidentiary hearing at the resentencing, he had not raised the issue of whether the judge could properly evaluate the record without such a hearing.

In the federal habeas proceedings, Ferguson argued that resentencing him without an evidentiary hearing violated notions of due process and fundamental fairness.[38] He asserted that Corbett

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[38] Ferguson made an additional argument that the resentencing was contrary to Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 2443 (2002), in which the Supreme Court held that a jury, rather than a judge,

and successor cases applied to his case because they reflected fundamental federal and state constitutional principles, the Florida Supreme Court's findings on the issue notwithstanding. Additionally, he maintained that his claim was not procedurally barred because Florida law has no contemporaneous objection requirement and any objection would have been futile in light of the Florida Supreme Court's instructions for the remand. The district court rejected these arguments. It found that Ferguson's Corbett claims did not state a basis for granting habeas relief and that they solely implicated violations of state law for which federal habeas relief would be unavailable.

As a preliminary note, it is doubtful that there is a federal constitutional principle requiring the sentencing judge to have heard the evidence before imposing sentence. We have never addressed this specific question, nor has any other federal court, as best as we can tell, and the cases Ferguson cites all address different concerns. See, e.g., United States v. Cofield, 272 F.3d 1303, 1306 (11th Cir. 2001) (per curiam) (articulating general rule that a district court must rehear witness testimony before rejecting magistrate judge's credibility findings but need not do so if it is accepting the findings). In fact, the only instances in which a court has imposed a similar requirement are Corbett and its progeny, which are

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must make all findings of fact necessary for eligibility for the death penalty. The district court rejected this argument, noting that we have construed Ring not to have retroactive application. See Sibley v. Culliver, 377 F.3d 1196, 1208 (11th Cir. 2004). Ferguson abandoned this argument on appeal.

premised on state law.[39] Additionally, the principle suggested by Ferguson may be at odds with a past cases in which we found that a substitute judge who read the trial record and transcripts was sufficiently familiar with a case to sentence a defendant. See United States v. Dowd, 451 F.3d 1244, 1256 (11th Cir. 2006); see also United States v. Casas, 425 F.3d 23, 56 (1st Cir. 2005) (noting that "a replacement judge is ordinarily capable of assessing the credibility of the witnesses and the evidence at trial by a thorough review of the record") (quotation marks and citation omitted). Given that "[a] sentencing judge enjoys broad discretion to determine whether he can perform sentencing duties in a case he did not try," there does not seem to be a federal constitutional principle at issue here. United States v. McGuinness, 769 F.2d 695, 696 (11th Cir. 1985) (per curiam). As a result, Ferguson's claim likely involves solely state law issues that could not serve as the basis for a federal habeas claim. See Hendrix v. Secretary, Fla. Dep't of Corr., 527 F.3d 1149, 1153 (11th Cir. 2008) (per curiam) (noting that "a violation of state law is not a ground for federal habeas relief").

However, assuming arguendo that Ferguson's claim involves a federal constitutional principle, it still may be subject to a procedural bar. "A state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude

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[39] Ferguson cites portions of the petitioner's brief in Corbett referencing federal constitutional bases for the asserted right; however, the Florida Supreme Court premised its decision entirely on state statutory and case law. See generally Corbett, 602 So. 2d 1240.

any subsequent federal habeas review of that claim." Payne v. Allen, 539 F.3d 1297, 1312–13 (11th Cir. 2008) (quotation marks and citation omitted). For such a bar to apply, the state court's decision must rest on "an independent and adequate state ground." Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001) (quotation marks and citation omitted). We apply a three-part test to determine whether a state procedural rule is adequate and independent. See id. First, the last state court to render judgment on the issue "must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim." Id. Second, "the state court's decision must rest solidly on state law grounds, and may not be intertwined with an interpretation of federal law." Id. (quotation marks and citation omitted). Third, the procedural rule has to be "adequate," meaning that it is not "applied in an arbitrary or unprecedented fashion." Id.

The Florida Supreme Court found Ferguson's due process claim to be procedurally barred because he failed to raise an objection on these grounds in the district court and thus had not preserved the issue for appellate review. [40] Florida law requires a

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[40] The court noted that, although Ferguson's counsel requested an evidentiary hearing at resentencing, "he failed to raise the grounds now raised — that Judge Klein could not properly evaluate the aggravation and mitigation on the basis of a cold record." Ferguson V, 632 So. 2d at 56. This claim had been "raised on direct appeal from resentencing, but since it was not raised below it was procedurally barred at that time." Id. Because Ferguson's state habeas petition referenced principles of

defendant to make a "contemporaneous, specific objection . . . at the time of the alleged error" to preserve an issue for appellate review. Overton v. State, 976 So. 2d 536, 547 (Fla. 2007) (per curiam). In this case, the Florida Supreme Court clearly and expressly invoked that state law principle in deeming the claim procedurally barred, and there is no indication that it relied on anything besides state law in applying the procedural bar.[41] Additionally, though the court discussed the merits of Ferguson's Corbett claim, we can still apply the state procedural bar since it couched its discussion of the procedural bar in the alternative. See Alderman v. Zant, 22 F.3d 1541, 1549 (11th Cir. 1994). Since the first two prongs of the adequate and independent state grounds test were met, the only remaining question is whether the Florida Supreme Court applied the contemporaneous objection rule in "an arbitrary and unprecedented fashion." Judd, 250 F.3d at 1313.

Under the contemporaneous objection rule, an issue is properly preserved if the trial court knows that an objection was made, clearly understands the nature of the objection, and denies that request. See Thomas v. State, 419 So. 2d 634, 636 (Fla. 1982). Though "magic words are not needed to make a proper objection," counsel must articulate his concern with sufficient specificity "to inform the trial judge of the alleged error." Williams v. State, 414 So. 2d 509, 512 (Fla. 1982). In sum, "an objection

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both state and federal due process, this procedural bar would apply to his federal due process claim.

[41] Although the Florida Supreme Court, in discussing the procedural bar, did not cite any statutory or case law to this effect, its statements reflect this general principle.

must be specific enough to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Id. at 511 (quotation marks and citation omitted).

Ferguson maintains that he met the contemporaneous objection requirement because his counsel requested an evidentiary hearing before the successor judge, which was sufficient to put the judge on notice of his due process objection to the resentencing. He notes that the Florida Supreme Court does not require counsel "to pursue a completely useless course when the judge has announced in advance that it will be fruitless." Thomas, 419 So. 2d at 635 (quotation marks and citation omitted). He asserts that the Florida Supreme Court's instruction that "[a]n additional sentence advisory verdict by a jury" would not be required on remand constitutes just such an announcement. Ferguson I, 417 So. 2d at 646. As a result, any objection his counsel could have made beyond requesting an evidentiary hearing would have been pointless.

There is little basis in the record from which the trial court could have concluded that Ferguson's counsel was making a due process objection to being resentenced by a successor judge without a hearing. Rather, all of the objections raised addressed the failure to hold an evidentiary hearing to permit the introduction of further mitigating evidence. Additionally, Ferguson's counsel failed to object when, before resentencing Ferguson, the court specifically asked whether there was any legal reason why it should not resentence him. Even though Florida law provides some leeway with respect to the form and substance of the objection, a

request for an evidentiary hearing is insufficiently specific to apprise the trial court that a due process objection was being made. See Williams, 414 So. 2d at 511–12. In light of this failure, Ferguson has not triggered the futility exception, even taking into account the Florida Supreme Court's statement about the limited scope of remand and the fact that Ferguson's appellate counsel raised the issue on appeal from the resentencing.

Ferguson cites various cases in which the Florida Supreme Court has indicated that the failure to object does not automatically preclude review; however, upon closer examination, they do not evince an arbitrary or irregular application of the contemporaneous objection rule. Most of his references are to cases in which the Florida Supreme Court addressed alleged Hitchcock violations even though the defense counsel did not make that objection at trial. See, e.g., Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988) (per curiam); Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987) (per curiam). In those instances, the court found it appropriate to consider the issue because "Hitchcock represented a sufficient change in the law to defeat the application of procedural default." Mikenas, 519 So. 2d at 602; see also Thompson, 515 So. 2d at 175. Additionally, in Smalley v. State, 546 So. 2d 720 (Fla. 1989) (per curiam), abrogation on other grounds recognized by Beltran-Lopez v. State, 626 So. 2d 163, 164 (Fla. 1993) (per curiam), the defense counsel failed to object to a "heinous, atrocious, or cruel" jury instruction, but the court decided to hear the merits of the argument because a recent Supreme Court case had raised the issue of whether such an instruction was unconstitutionally vague under the

Eighth and Fourteenth Amendments. See Smalley, 546 So. 2d at 722.

The only case that may support Ferguson's argument is Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977), in which the court noted that counsel's failure to object to testimony "should not be conclusive of the special scope of review by this Court in death cases." There appear to be no other state cases citing that principle, although we cited it in two decisions, and it may not be applicable outside of the context of admissibility of testimony. See Mann v. Dugger, 817 F.2d 1471, 1475 (11th Cir. 1987), reh'g granted and opinion vacated on other grounds by Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987) (per curiam); Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. Unit B 1982), vacated on other grounds by Wainwright v. Henry, 463 U.S. 1223, 103 S. Ct. 3566 (1983) (mem.). In any event, one instance of not applying the contemporaneous objection rule does not indicate that the Florida Supreme Court has not adhered strictly to the rule. As a result, there is no indication that the procedural bar was not an adequate state ground.

Because the contemporaneous objection rule is an adequate and independent state ground, we are barred from reviewing Ferguson's successor judge claim unless he can show cause and prejudice to excuse the procedural bar or that "a fundamental miscarriage of justice" would result. Zeigler, 345 F.3d at 1304 (quotation marks and citation omitted). Ferguson asserts that he has shown cause because it would have been fruitless to raise such an objection in light of the Florida Supreme Court's instructions on remand. However, "the futility of presenting an objection to the state courts cannot alone constitute

cause for a failure to object at trial." Engle v. Isaac, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573 (1982). Since Ferguson has cited no other rationale for his failure to object, we find that he has not shown cause for the procedural default. Furthermore, although Ferguson does not argue that applying the bar would constitute a "fundamental miscarriage of justice," we note that his situation would not fall under that description, which is reserved for "extraordinary" circumstances, such as "where a constitutional violation has resulted in the conviction of someone who is actually innocent." Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). We therefore are procedurally barred from hearing Ferguson's due process claim. As a result, we conclude that the district court correctly denied Ferguson's habeas petition with respect to this claim.

H. Race-Based Peremptory Challenges

Ferguson contends that the prosecutor at both of his trials made race-based peremptory challenges. He asserts that these challenges were unconstitutional under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), and urges us to find that Batson applies retroactively in capital cases. He also maintains that his Batson claim would not be procedurally defaulted because his counsel at both trials were ineffective in not objecting to the race-based strikes. In the alternative, he argues that he is entitled to an evidentiary hearing to present evidence that would show the existence of systematic exclusion practices in violation of Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965).

Ferguson first raised the issue of racially-based peremptory challenges during the 3.850 proceedings, arguing that the State violated his right to a fair and

impartial jury and equal protection rights by exercising such challenges, that his counsel was ineffective for failing to object to those challenges, and that Batson should apply to his claim. The circuit court denied this claim in two separate orders. It first struck the portion of the claim alleging a Batson violation because it found that violations of Batson, and a corresponding state case, State v. Neil, 457 So. 2d 481 (Fla. 1984), were not fundamental error nor applied retroactively and therefore could not be raised for the first time in a motion for post-conviction relief. In a later order, the court found that Ferguson failed to show either that the jury was all white or that, even if it was, the State used its peremptory challenges to excuse black jurors solely because of their race. The court also determined that, even if the State had such race-based motives, Ferguson had not shown that his counsel was deficient or ineffective in failing to object nor that he had been prejudiced by such a failure. The Florida Supreme Court summarily denied this claim, finding it to be without merit.

The district court rejected all of Ferguson's arguments with respect to the alleged race-based peremptory challenges. It found that Ferguson's Batson claim failed because Ferguson could not show that blacks had been systematically excluded from his jury.[42] It also determined that, assuming that such challenges had occurred, there was no evidence that Ferguson was prejudiced by them. The court

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[42] The court made no findings about Batson's potential retroactivity nor about whether his counsel was ineffective for not objecting to the challenges, although it may have implicitly rejected the latter claim.

noted, in particular, that the State allowed white jurors to be empaneled even though they expressed objections to the death penalty but struck black jurors who had no such qualms.

Batson is not retroactively applicable to defendants whose convictions and direct appeals became final before the Supreme Court issued Batson. See Baldwin v. Johnson, 152 F.3d 1304, 1315 n.10 (11th Cir. 1998); Jackson v. Herring, 42 F.3d 1350, 1356 (11th Cir. 1992). Ferguson contends that we should apply a different standard here because the Supreme Court has never explicitly stated that Batson does not apply retroactively in capital proceedings. However, there appear to be no cases in which courts have permitted such a retroactive application. In fact, in the case Ferguson references for the notion that the Supreme Court has not ruled on the issue, Williams v. Chrans, 945 F.2d 926 (7th Cir. 1991), the Seventh Circuit found that Batson did not establish a new rule under Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989), and thus would not apply retroactively in capital decisions. See Williams, 945 F.2d at 946.

Since Batson does not apply to Ferguson's peremptory challenge argument, we review the issue under the standards established in Swain. See Baldwin, 152 F.3d at 1315 n.10. To state a claim under Swain, a habeas petitioner must show more than that the prosecutor deliberately used peremptory strikes to remove African-Americans from the jury; rather, he has to "demonstrate that the prosecutor, over time, systematically excluded blacks from serving on petit juries." Id. at 1315. Prosecutors are presumed to have utilized their strikes in a fair and impartial manner. See Jackson,

42 F.3d at 1356. A petitioner can overcome this presumption by presenting evidence that would "manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials," including statistical evidence or testimony from those who have witnessed the pattern of systematic exclusion. Id.

As a preliminary note, the actual racial composition of the jury at both trials is unclear. Since none of the attorneys at either trial could remember the racial makeup of the jury, the principal evidence comes from testimony at the 3.850 evidentiary hearing of a law student, Chad Roberts, who compared the names of members of the jury pool to voter registration records to determine the race of those in the pool. Roberts stated that, based on his research, all twelve of the jurors and both alternates in the Carol City trial were white, that four of the twenty-nine other members of the jury pool were definitely black, and that three of those four were peremptorily challenged by the State even though they had no objection to the death penalty. He also determined that the twelve jurors and two alternates in the Hialeah trial were white, that six of the thirty-six other jury pool members were definitely black, and that five of those six were peremptorily challenged by the State.[43] Four of those five struck pool members had no objection to the imposition of the death penalty, although eight of the impaneled jury members stated that they had such objections.

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[43] There was one other peremptorily-challenged member of the jury pool who Roberts thought was likely black, though he could make no definitive finding.

Assuming that the juries were as Roberts testified, Ferguson has not provided any evidence of systematic exclusion by the prosecutor in both cases, Robert Kaye. At the 3.850 proceedings, Ferguson called John McGuirk, who practiced as a criminal defense attorney in the late 1970s and early 1980s. McGuirk testified that he believed state attorneys at the time were "very conscious of the race of the juror" depending on the type of case and that he experienced some situations in which a prosecutor appeared to be making peremptory challenges based on race. App. NN at 2910–11. He also stated that he made such objections at the time, that he could think of no reason why a defense attorney would not make such an objection if the State appeared to be using race-based peremptory challenges, and that he believed excluding blacks from the jury could affect the outcome of the trial. However, McGuirk also testified that he did not believe that the prosecutor in Ferguson's trials systematically excluded black jurors and noted that state attorneys had the same interest in the race of the jurors as any trial lawyer would have had. Additionally, when Kaye testified at the 3.850 hearing, he denied having struck jurors because of their race and stated that he would not have done so for fear of having the verdict attacked on the basis of the racial makeup of the jury.[44] All of this evidence, taken together, is insufficient to show or even strongly suggest that Kaye systematically struck jurors based on their race. Ferguson thus has not established that a Swain violation occurred.

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[44] At the 3.850 hearing, Kaye could not recall why he peremptorily struck particular members of the jury panel in the Hialeah case when questioned about it.

Furthermore, since there was no Swain or Batson violation, Ferguson's trial counsel could not be ineffective for failing to object to the challenges.

We likewise find that Ferguson is not entitled to an evidentiary hearing on the issue. Ferguson asserts that we should grant such a hearing because he has provided strong evidence of discriminatory practices even though the circuit court in the 3.850 proceedings denied his request for discovery on the issue. However, this situation does not trigger the district court's duty to hold an evidentiary hearing. See Kelley, 377 F.3d at 1334. The district court therefore had the discretion to grant or deny the request, and there appears to be no basis for finding that it abused this discretion. See id. at 1333. Though the state court denied his request for discovery, it did so after it had already struck the Batson portion of his claim. Furthermore, there was a subsequent evidentiary hearing during those proceedings, at which Ferguson presented evidence on a range of topics, including the peremptory challenges. Ferguson thus has had ample opportunity to present evidence on the issue. We therefore conclude that the district court correctly denied Ferguson's habeas claim with respect to this issue and that it did not abuse its discretion in denying an evidentiary hearing.

I. *Ex Parte* Contacts During Post-Conviction Proceedings

Ferguson asserts that he did not receive full and fair state post-conviction proceedings because of ex parte contacts between the prosecutor and the post-conviction judge. He requests that we either hold a new federal court hearing in which no deference would be given to the state courts' findings of fact or,

in the alternative, that we permit an evidentiary hearing to investigate the nature and extent of these ex parte contacts.

In January 1988, Ferguson's counsel learned from a state attorney that there had been ex parte communications between state counsel and Judge Friedman, the judge initially assigned to Ferguson's 3.850 motion, allegedly regarding the rescheduling of Ferguson's psychiatric evaluations. At a 19 May 1988 hearing before Judge Snyder, to whom the case had been reassigned from Judge Friedman, Ferguson's counsel complained about these communications. Judge Snyder stated that he would be open to ex parte communications if they would help expedite the scheduling of the examinations and that he would inform Ferguson's counsel about any such communications immediately after they occurred.[45] Shortly thereafter, there was an ex parte

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[45] In particular, Judge Snyder stated to the state attorney,

> I am not worried about Mr. Prettyman [Ferguson's counsel] saying you [the state attorney] can't talk to me. You want something done that I have ordered you to do and you want my help in doing it, just call me, okay? He [Mr. Prettyman] doesn't like it, that's okay. I never worry about ex parte because I don't ex parte anybody. If there is anything that ever has to be done, Mr. Prettyman, you'll be notified immediately. But, I am not going to let that stand in the way to have an entire hearing and bring a lawyer in from Washington and we still haven't accomplished anything.

App. NN at 1030–31.

contact between the State and Judge Snyder, allegedly about scheduling issues, about which Ferguson's counsel was informed promptly. On a 26 May 1988 conference call between the parties and Judge Snyder, Ferguson's counsel indicated that he believed that such contacts were improper and violated Ferguson's due process and Sixth Amendment rights.

On 23 February 1989, Judge Snyder denied Ferguson's motion to stay the 3.850 proceedings due to Ferguson's purported incompetency. On 22 March 1989, Ferguson's counsel filed a motion requesting that Judge Snyder disqualify himself from the proceedings because the ex parte contacts made the judge unable to be impartial or maintain the appearance of impartiality. The circuit court denied this motion, which it found to be legally insufficient for three reasons: (1) it did not comply with the technical requirements of Florida Statute 38.10 and Florida Rule of Criminal Procedure 3.230; (2) it was untimely and intended solely to delay the implementation of an adverse ruling; and (3) it did not set forth a sufficient factual basis for a well-founded belief that the court would be prejudiced against Ferguson. Ferguson's counsel subsequently sought a writ of prohibition with the Florida Supreme Court, which the court summarily denied.[46]

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[46] The district court's opinion in the federal habeas proceedings mentions an ex parte phone call Judge Snyder made to Ferguson's counsel at some point in time subsequent to the Florida Supreme Court's denial of the writ. The parties do not reference this in the briefs, and, since it did not involve communications with opposing counsel, it likely would not have caused Ferguson any prejudice.

He then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court denied.

The district court denied Ferguson's claim that the ex parte communications deprived him of a full and fair hearing. The court treated this issue as an argument that the factual findings of the circuit court in the 3.850 proceedings were not entitled to a presumption of correctness. It noted that the circuit court had asserted that the ex parte communications solely addressed scheduling issues, and found that there was no evidence in the record either to contradict this assertion or to suggest that the circuit court's factual findings had been affected by the ex parte communications. As a result, the district court concluded that the circuit court's factual findings were entitled to a presumption of correctness.

Although the district court did not address the issue explicitly, this claim may be subject to a procedural bar. The circuit court's denial of the motion to recuse was based on at least one state procedural ground, the untimely filing of the motion, in addition to the more substantive ground of failing to show a factual basis for fear of prejudice due to the contacts.[47] For the purposes of a possible procedural

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[47] The other basis for denying the claim, the failure to file affidavits with the motion, as required under Fla. R. Crim. P. 3.230, also is arguably procedural and thus could bar Ferguson's claim. The State does not discuss this rationale, however, and Ferguson likely has shown cause for the default — that he did not have first-hand knowledge of the contents of the ex parte contacts and thus could not provide affidavits — as well as resulting prejudice, i.e., that his claim was barred as a result of this failure. Furthermore, as discussed infra, Rule 1.432 of

bar, this reasoning would be controlling since the Florida Supreme Court summarily denied the petition, and we treat such summary denials as implicitly accepting both the judgment and the rationale of the trial court. See Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir. 1990) (noting that "the clear inference to be drawn from the appellate court's per curiam affirmance of the trial court's decision explicitly based on procedural default is that the court accepted not only the judgment but the reasoning of the trial court"). In this case, the circuit court's rationale is couched in the alternative, so we can and should apply the timeliness procedural bar if it was correctly applied. See Alderman, 22 F.3d at 1549.

We thus must determine whether the procedural bar constitutes an adequate and independent state ground. See id. In this case, Ferguson's counsel brought the original motion to recuse pursuant to Florida Rule of Criminal Procedure 3.230 and Florida Statute § 38.10. Since Florida courts treat 3.850 proceedings as civil actions, Ferguson probably should have cited Rule 1.432 of the Florida Rules of Civil Procedure, which governs disqualification of judges in civil cases, rather than Rule 3.230.[48] See

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the Florida Rules of Civil Procedure likely applies here instead and it has no affidavit requirement.

[48] The State raised this issue in its opposition to the motion; however, the circuit court did not address it and instead analyzed the issue under Rule 3.230. The Florida Supreme Court has referenced Rule 3.230 in one case involving a motion to disqualify a post-conviction judge; however, it did so in passing and without any discussion

State v. White, 470 So. 2d 1377, 1378 (Fla. 1985) (describing 3.850 motions as civil actions). In any event, the relevant timeliness standards for all three of these provisions were essentially the same at the time the motion was filed, so this does not affect our analysis.[49] Neither Rule 3.230 nor Florida Statute 38.10 discussed timeliness for a post-conviction disqualification motion. The only time bar mentioned in the versions of those provisions then in effect was Rule 3.230's requirement that the motion be filed "no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time."[50] Fla. R. Crim. P. 3.230(c) (1989 ed.); see Fla. Stat. § 38.10. The applicable version of Rule 1.432, on the other hand, required the movant to file the motion "within a reasonable time after discovery of the facts constituting grounds for disqualification." Fla. R. Civ. P. 1.432(c) (1989 ed.). In addition to this

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of whether it should be applied. See Suarez v. Dugger, 527 So. 2d 190, 192 (Fla. 1988) (per curiam).

[49] Both Rule 1.432 and Rule 3.230 have now been replaced by Rule 2.330 of the Florida Rules of Judicial Administration, which requires motions to disqualify to be filed "within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion." Fla. R. Jud. Admin. 2.330 (2009).

[50] The Florida Supreme Court, after the repeal of Rule 3.230, commented in passing that the rule "required that a motion to disqualify be made within ten days after discovery of the facts forming the basis for the motion." Schwab v. State, 814 So. 2d 402, 407 n.6 (Fla. 2002) (per curiam). However, we can find no cases supporting that interpretation while the rule was still in effect.

statutory guidance, Florida courts have deemed a motion for recusal to be untimely if the moving party waits to file the motion until after it has suffered an adverse ruling, unless the party can show good cause for the delay. See Fischer v. Knuck, 497 So. 2d 240, 243 (Fla. 1986).

The first two prongs of the adequate and independent state grounds test have been met here. The last state court to render judgment on the issue clearly and expressly invoked state procedural grounds to resolve the claim. See Judd, 250 F.3d at 1313. Additionally, that court's decision rested solidly on state law grounds, without any federal issues coming into play. See id. The only relevant question therefore is whether the procedural bar was "applied in an arbitrary or unprecedented fashion." Id.

In this case, Ferguson's counsel was aware of the ex parte contacts as early as January 1988 yet failed to file the motion seeking disqualification until more than a year later. Furthermore, in that motion he admitted that he decided to file the motion only after suffering an adverse ruling on the motion to stay. Accordingly, the motion would be untimely under Florida law unless Ferguson can show good cause for the delay in filing. See Fischer, 497 So. 2d at 243. Ferguson asserts that this delay was acceptable because his counsel detected Judge Snyder's potential bias only when that ruling came out. However, this contention is belied by the fact that his counsel had objected on multiple prior occasions to the ex parte contacts but did not file a motion in those instances. In light of this background, the decision to wait until after the adverse ruling appears to be the kind of delaying tactic that Florida

courts have frowned upon.[51] See id. at 242 (noting that a recusal motion was "designed to frustrate the process by which petitioner suffered an adverse ruling"); see also Marcotte v. Gloeckner, 679 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1996) (per curiam) (deeming timely a recusal motion filed after an adverse ruling where the underlying facts were discovered only after that ruling). Given this precedent, there is no indication that the circuit court arbitrarily applied the procedural bar. See Judd, 250 F.3d at 1313. Since Ferguson has not alleged cause or prejudice for the procedural default (other than the contention that the procedural rule was not regularly followed) nor does there appear to be any fundamental miscarriage of justice, we cannot hear the claim. See Zeigler, 345 F.3d at 1304. The district court thus correctly denied Ferguson's habeas claim with respect to this issue.[52]

J. Issues Relating to Ferguson's Competency

The parties raise three issues with respect to Ferguson's competency and right to be competent

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[51] As the circuit court noted, this delaying intent also is evidenced by the fact that Ferguson's counsel sought to have all prior orders by the circuit court vacated in addition to having the judge recuse himself.

[52] Additionally, even if the claim had not been procedurally defaulted, it would fail. Because Ferguson has not alleged any actual bias, he has not established a federal violation, and we cannot review his purely state law claim. See Hendrix, 527 F.3d at 1153–54. Furthermore, as a matter of legal ethics, "it is well-established that an ex parte communication which does not concern the merits of the case is permissible." Drobny v. Commissioner, 113 F.3d 670, 680 (7th Cir. 1997).

during the various habeas and post-conviction proceedings. Ferguson appeals the district court's determination that he was competent to proceed with his federal habeas claim as well as its dismissal of his federal habeas claim asserting a due process violation for holding the 3.850 proceedings despite his alleged incompetency.[53] The State cross-appeals the district court's decision to hold an evidentiary hearing on the question of competency.

1. Competency to Proceed with 3.850 Post-Conviction Claim

Ferguson contends that he is entitled to a de novo evidentiary hearing because the 3.850 proceedings were held while he was incompetent. He asserts that the district court erred in finding both that he had no federal constitutional right to be competent during those proceedings and that the 3.850 court's competency determination was supported by the record.

The circuit court held three days of evidentiary hearings in August and October 1988 on the question of competency. The court subsequently issued an order finding Ferguson competent and denying his motion to stay the proceedings because of his incompetency. The Florida Supreme Court initially issued a summary denial of Ferguson's appeal related to this decision. See Ferguson IV, 593 So. 2d

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[53] Ferguson's statement of issues mentions only the district court's violating his right not to proceed while incompetent, which seems to refer to that court's decision finding him competent to proceed with the federal habeas claim. However, the body of his initial brief discusses due process violations with respect to his competency during the 3.850 proceedings.

at 513. The court had the opportunity to reexamine this evidence in greater depth in a subsequent, post-Carter appeal. After determining that Carter applied retroactively, the court looked at whether the evidence supported the circuit court's competency findings. It recounted the evidence presented at the hearing, essentially agreeing with the circuit court's descriptions, acknowledged that the evidence regarding Ferguson's competency was conflicting, and found that there was adequate support for the circuit court to reject the opinions of those doctors finding Ferguson incompetent. As a result, the court concluded that the circuit court had not abused its discretion in denying the motion to stay.

Even if Ferguson had a federal due process right to be competent during the 3.850 proceedings,[54] these

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[54] There is reason to doubt that such a right exists. In Carter, the Florida Supreme Court found that there was a right to be competent during 3.850 proceedings. See Carter, 706 So. 2d at 875. The court did not base its decision on an express constitutional ground; however, in Ferguson VI it noted that Carter reflected "considerations of due process, considerations which have previously guided this Court's hand in the postconviction arena" and cited cases in which it had referenced Fifth Amendment due process concerns. See Ferguson VI, 789 So. 2d at 311. That statement notwithstanding, the right to competency appears to stem principally from the right to collateral counsel under Florida law. See Carter, 706 So. 2d at 875 (noting that "the right to collateral counsel, as well as the postconviction proceedings themselves, would be practically meaningless" if the petitioner was not competent to assist counsel). As the district court noted, federal courts generally have rejected attempts to make a federal due process claim based on ineffective assistance

competency findings are entitled to a presumption of correctness, which we may ignore "only if the petitioner shows by clear and convincing evidence that the state court's determination was not fairly supported by the record." Turner v. Crosby, 339 F.3d 1247, 1273 (11th Cir. 2003) (quotation marks and citation omitted); see Hauser ex rel. Crawford v. Moore, 223 F.3d 1316, 1323 (11th Cir. 2000) (per curiam). "This deference requires that [we] more than simply disagree with the state court before rejecting its factual determinations. Instead, [we] must conclude that the state court's findings lacked even fair support in the record." Turner, 339 F.3d at 1273 (quotation marks and citation omitted). After carefully examining the record from the competency hearing, we find that the evidence fairly supported the finding that Ferguson was competent to proceed with his 3.850 claim. Accordingly, we conclude that the district court properly denied both Ferguson's request for an evidentiary hearing and his habeas claim with respect to this issue.

2. Competency to Proceed with Federal Habeas Claim

Ferguson asserts that the district court's determination that he was competent to proceed with his federal habeas claim was clearly erroneous because the evidence established that his paranoid schizophrenia prevented him from providing full assistance to his counsel during the federal habeas proceedings. Since we have not reviewed a habeas competency finding before, we have not had occasion to address the relevant standards of review. We

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of state post-conviction counsel. See, e.g., Ogan v. Cockrell, 297 F.3d 349, 357 (5th Cir. 2002).

generally review a district court's determinations that a defendant is competent to stand trial for clear error, and the parties agree that the same standard of review should apply here. See United States v. Hogan, 986 F.2d 1364, 1372 (11th Cir. 1993) (using "clearly erroneous standard" to evaluate finding that petitioner was competent to stand trial). The applicable competency standard is whether the petitioner has both "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." Moore v. Campbell, 344 F.3d 1313, 1321 (11th Cir. 2003) (per curiam) (quotation marks and citation omitted).

After holding a competency hearing, the district court found that there was credible evidence to show that Ferguson at one time suffered from a mental disorder that had symptoms associated with paranoid schizophrenia and that, since 1994, his mental health has improved so as to make him "no longer a disruptive member of his prison environment." R4-107 at 15. It also found that his disorder was in remission and that he was malingering or exaggerating his symptoms. See id. The court further found that Ferguson had the "mental competency, clarity of thought, directness of speech, and motivation to advance his interests and objectives when faced with a variety of adverse circumstances." Id. at 15, 17. The court made a number of other factual findings including that the totality of his test results supported the conclusion that he was "consciously reporting symptoms of mental illness that he [was] not presently experiencing" and that his unwillingness to

cooperate with his counsel was based on a desire to avoid punishment. Id. at 17, 20. Based on all of this, the court concluded that Ferguson "ha[d] sufficient present ability to consult with counsel with a reasonable degree of rational understanding — and ha[d] a rational as well as factual understanding of the proceedings against him." Id. at 21–23.

After thoroughly reviewing the transcripts and evidence presented at the evidentiary hearing, we find that there was ample evidence to support the district court's findings. Accordingly, assuming arguendo that there is a federal right to be competent during federal habeas proceedings,[55] we conclude the district court did not clearly err in deeming Ferguson competent to proceed with his federal habeas petition and did not abuse its discretion in denying his motion to stay. See American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc., 743 F.2d 1519, 1525 (11th Cir. 1984) (noting that a "motion to stay is directed to the district court's sound discretion"). In light of this conclusion, we need not address the State's cross-appeal regarding whether the district court improperly granted an evidentiary hearing on the issue.

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[55] The Ninth Circuit has found that there is a statutory right to be competent; however, the other circuits to have discussed the issue have assumed, without deciding, that such a right exists and resolved the competency issue on other grounds. See Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 807–17 (9th Cir. 2003); see also Paul v. United States, 534 F.3d 832, 845–48 (8th Cir. 2008); Holmes v. Buss, 506 F.3d 576, 578–79 (7th Cir. 2007).

III. CONCLUSION

Ferguson filed this appeal seeking federal habeas relief with respect to nine different claims in his habeas petition. He also appeals the district court's order denying his motion to stay the proceedings based on his alleged incompetency. The State cross-appeals the district court's decision to hold an evidentiary hearing on the issue of Ferguson's competency. We hold that Ferguson was not entitled to habeas relief on any of his claims. Furthermore, insomuch as the district court did not clearly err in finding Ferguson competent to proceed with his habeas petition and did not abuse its discretion in denying his motion to stay the federal habeas proceedings, we need not consider the rationale for the State's cross-appeal. Accordingly, we AFFIRM the district court's denial of Ferguson's habeas petition and his motion to stay the habeas proceedings.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-573-CIV-HURLEY/LYNCH

JOHN ERROL FERGUSON, or
***DOROTHY FERGUSON*, individually**
and as Next Friend on behalf of
JOHN ERROL FERGUSON,

Petitioner,

v.

JAMES V. CROSBY, JR.,
SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS, STATE OF FLORIDA,

Respondent.
_____/

MEMORANDUM OPINION
DENYING SECOND AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE is before the court upon petitioner's second amended petition for writ of habeas corpus, filed September 26, 2003. For the reasons expressed below, petitioner's second amended petition for writ of habeas corpus will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are taken from the Florida Supreme Court's opinions in Ferguson v. State, 417

So.2d 631 (Fla. 1982); Ferguson v. State, 417 So.2d 639 (Fla. 1982); and the agreed portions of the petitioner's and respondent's briefs in the above styled matter. Petitioner John Errol Ferguson, a prisoner in the lawful custody of the State of Florida under sentence of death, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1]

THE CAROL CITY MURDERS

On July 27, 1977, at approximately 8:15 p.m., petitioner, posing as a Florida Power and Light employee, requested permission from Margaret Wooden to enter her Carol City home and check the electrical outlets. After gaining entry and checking several rooms, petitioner drew a gun and tied and blindfolded Ms. Wooden. He then let two men into the house who joined him in searching for drugs and money. Some two hours later, the owner of the house, Livingston Stocker, and five friends returned home. Petitioner, who had identified himself to Ms. Wooden as "Lucky," and his cohorts tied, blindfolded, and searched the six men. All seven individuals were then moved from the living room to the northeast bedroom.

Shortly thereafter, Ms. Wooden's boyfriend, Michael Miller, entered the house. He too was bound and searched. Mr. Miller and Ms. Wooden were then moved to her bedroom and the other six men returned to the living room. At some point, one intruder's mask fell, revealing his face. Mr. Miller

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[1] Since this petition was originally filed in 1995, one year before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the petition is governed by the pre-1996 version of 28 U.S.C. § 2254. See Ziegler v. Crosby, 345 F.3d 1300, 1304 (11th Cir. 2003).

and Ms. Wooden were kneeling on the floor with their upper bodies lying across the bed. Ms. Wooden heard shots from the living room and then saw a pillow coming toward her head after which she was shot. Miraculously, she was not killed. She witnessed Mr. Miller being shot but did not see the shooter. She did, however, hear the petitioner run out of the room. Eventually, Ms. Wooden managed to escape and ran to a neighbor's house to call the police. When the police arrived, they found six murdered victims. All had been executed with a shot to the back of the head after their hands had been tied behind their backs. One of the victims, Johnnie Hall, survived a shotgun blast to the back of his head and testified during petitioner's trial as to the methodical execution of the other victims. In sum, six persons were killed and two persons survived and ultimately testified during petitioner's trial.

On September 13, 1977, petitioner and three co-defendants were indicted for the offenses detailed above. Specifically, petitioner was charged with six counts of first degree murder, two counts of attempted first degree murder, and four counts of armed robbery. Although indicted, it appears that petitioner was not incarcerated until his arrest for the Hialeah murders described below. Adolphus Archie, the "wheelman," was allowed to plead guilty to second degree murder and received a twenty-year concurrent sentence on all counts in exchange for his testimony at trial. He testified at the jury trial that commenced on May 22, 1978 that he had dropped Ferguson, Marvin Francois, and Beauford White off in the Carol City area to "rip off" a drug house. He did not see the actual shooting, but later saw unfamiliar weapons and jewelry in Beauford's and

Francois' possession. Petitioner was tried alone and convicted on all counts -- with the exception of one count of armed robbery for which he was acquitted. After an advisory sentencing hearing, the jury recommended death. The judge followed the jury's recommendation and imposed six death sentences, two consecutive prison terms of thirty years, and three prison terms for life. These events are hereinafter referred to as "the Carol City murders."

THE HIALEAH MURDERS

On Sunday, January 8, 1978 -- approximately five months after the Carol City murders -- Brian Glenfeld and Belinda Worley, both 17, left a Youth-for-Christ meeting in Hialeah, Florida around 9:00 p.m. They were supposed to meet friends at an ice cream parlor, but never showed up. The next morning, their bodies were discovered by two passersby in a nearby wooded area. Mr. Glenfeld's body was behind the wheel of the car. He had been shot in the chest and arm and killed by a bullet wound to the head. Ms. Worley's body was found several hundred yards away under a dense growth. She was wearing only jeans; her other clothes were next to her body. She had been shot in the back of the head and an autopsy revealed that she had been raped.

Mr. Glenfeld's father testified that Ms. Worley had been wearing two rings, a gold bracelet, and a pair of earrings when she and his son left his home on Sunday evening. None of the jewelry was found with the bodies. Ms. Worley's earlobe was torn where an earring had been worn. Mr. Glenfeld's empty wallet was found in Ms. Worley's purse near her body. Mr. Glenfeld's father testified that he had seen both the

wallet and some cash in his son's possession the previous evening.

On April 5, 1978, petitioner was arrested at his apartment pursuant to a warrant for unlawful flight to avoid prosecution in connection with the Carol City murders. At the time of his arrest, a .357 magnum capable of firing .38 caliber bullets like those that killed Mr. Glenfeld and Ms. Worley was found in petitioner's possession. The gun was registered to Livingston Stocker, one of the victims in the Carol City murders. Margaret Wooden, a Carol City survivor, testified that petitioner had been in Stocker's Carol City house on July 27, 1977, the night he was murdered. After petitioner's arrest, he was read his Miranda rights each time he was questioned. Ultimately, he confessed to killing the "two kids" i.e., Brian Glenfeld and Belinda Worley. Following a jury trial at which insanity was the principal defense, Ferguson was convicted on two counts of first degree murder. The jury recommended the death penalty and the trial judge imposed two death sentences and a term of imprisonment. These events are hereinafter referred to as "the Hialeah murders."

The Florida Supreme Court affirmed petitioner's convictions in both cases after separate appeals, but reversed all eight death sentences because the trial judge had improperly failed to consider and weigh statutory mitigating factors and because the trial judge relied on invalid statutory aggravating factors. Ferguson v. State, 417 So.2d 631 (Fla. 1982) (the Hialeah Case); Ferguson v. State, 417 So.2d 639 (Fla. 1982) (the Carol City case). On remand for re-sentencing, a different judge imposed eight total death sentences for the murders in both cases. The

re-sentencing occurred without re-impaneling a jury to make recommendations and without an evidentiary hearing. The Florida Supreme Court affirmed the sentences in a consolidated appeal. Ferguson v. State, 474 So. 2d 208 (Fla. 1985).

Subsequently, on October 15, 1987, petitioner's mother Dorothy Ferguson, acting as next friend, timely filed a motion for post-conviction relief in the Dade County Circuit Court under Fla. R. Crim. P. 3.850.[2] During the course of the state post-conviction proceedings, petitioner sought to stay his 3.850 proceedings on the ground that he was incompetent to assist counsel with certain factual inquiries or to participate in the proceedings. On February 23, 1989, the state trial court denied petitioner's motion for a stay. On June 19, 1990, the court also denied petitioner's 3.850 motion. Thereafter, the Florida Supreme Court affirmed the denial of petitioner's 3.850 motion. Ferguson v. State, 593 So. 2d 508 (Fla. 1992). In addition, a petition for habeas corpus relief was filed on petitioner's behalf in the Florida Supreme Court and was denied on December 9, 1993. Ferguson v. Singletary, 632 So. 2d 52 (Fla. 1993).

Petitioner filed the initial version of his federal habeas corpus petition on March 20, 1995. It was assigned to a predecessor judge. Contemporaneously, petitioner moved to stay the federal habeas proceeding on the asserted ground that he was incompetent to assist his counsel due to mental illness. This motion was denied on March 18, 1999.

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[2] Petitioner's mother was allowed to bring the Rule 3.850 action on her son's behalf due to concerns that petitioner was incompetent and, thus, incapable of maintaining the proceeding himself.

Inexplicably, the record is silent as to the reason or justification for this four-year hiatus. On July 14, 1999, following the predecessor judge's denial of petitioner's motion to stay his federal habeas proceeding, petitioner filed a motion in the state trial court to reinstate certain of the claims raised in his initial Rule 3.850 motion and to stay his state post-conviction proceedings in light of the Florida Supreme Court's decision in Carter v. State, 706 So. 2d 873 (Fla. 1997), which held that Florida law is violated when courts conduct post-conviction proceedings while a capital prisoner is incompetent.

In anticipation of filing these renewed state claims, on July 12, 1999, petitioner again moved the federal district court to stay his federal habeas action so that he might exhaust his state remedies. For reasons not evident from the record, an additional ten months passed before the district court granted the stay on May 15, 2000. Meanwhile, on August 18, 1999, the state trial court summarily denied petitioner's motion to reinstate the Rule 3.850 petition and the Florida Supreme Court affirmed on May 10, 2001.

In its decision, the Florida Supreme Court held that, although the fundamental right to be competent during post-conviction proceedings was retroactive and fully applicable to petitioner, the trial court had not abused its discretion in finding Ferguson competent to proceed on the basis of a competency determination that occurred in 1988. Ferguson v. State, 789 So. 2d 306, 315 (Fla. 2001). Thus, on August 7, 2001, the predecessor judge lifted the stay on petitioner's federal habeas petition and permitted him to file an amended habeas petition to include intervening changes in the law and changes

to petitioner's mental health. Following the untimely death of the predecessor judge, this case was re-assigned to the undersigned on May 27, 2003. Pursuant to this court's order on August 11, 2003, petitioner was granted leave to file the now-pending second amended habeas petition to reflect intervening changes in the law.

On July 9, 2004, after granting the parties' requested extensions of time to file responses and replies to petitioner's second amended section 2254 petition, the court scheduled an evidentiary hearing to determine whether petitioner was competent to assist his counsel with these capital habeas proceedings. This hearing was held in response to petitioner's motion to stay his habeas proceeding on the basis of his alleged incompetency. After affording both parties the time and resources requested to conduct comprehensive mental health examinations of petitioner, the court conducted a five-day evidentiary hearing during the week of December 6, 2004 to consider petitioner's competency. Additionally, the court accepted post-hearing briefs which were received on or before February 18, 2005.

As a preliminary matter, the court has entered a separate order finding petitioner competent to proceed with his federal habeas petition. The court has found that petitioner has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and has a rational as well as factual understanding of the proceedings against him. See Moore v. Campbell, 344 F.3d 1313, 1321 (11th Cir. 2003) (citing Dusky v. United States, 362 U.S. 402 (1960)).

SECOND AMENDED PETITION

Since this petition was originally filed in 1995, one year before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the petition is governed by the pre-1996 version of 28 U.S.C. § 2254. See Ziegler v. Crosby, 345 F.3d 1300, 1304 (11th Cir. 2003).

Petitioner contends that he has been deprived of his constitutional rights through the following violations:

1) The state court proceedings failed to recognize and properly protect petitioner's constitutional rights relating to competency;

2) Petitioner's state post-conviction proceedings were so tainted by constitutional violations that they failed to provide a full and fair hearing;

3) The state's failure to disclose Brady impeachment evidence at trial violated petitioner's due process rights;

4) The state used unconstitutional race-based peremptory challenges to which ineffective defense counsel failed to object;

5) Petitioner received ineffective assistance of counsel during his sentencing proceedings;

6) Petitioner's constitutional rights were violated through errors prohibited under Hitchcock v. Dugger, 481 U.S. 393 (1987);

7) Petitioner's constitutional rights were violated through errors prohibited under Ring v. Arizona, 536 U.S. 584 (2002);

8) Other constitutional errors infected petitioner's trials and sentencing.

The court addresses each of these claims in detail below and, for the reasons stated herein, holds that each of these claims fails to provide a basis upon which the court should issue a writ of habeas corpus.

DISCUSSION

I. Claim that the state court proceedings failed to recognize and properly protect petitioner's constitutional rights relating to competency

A. Claim that petitioner's due process rights were violated because he was incompetent during his state post-conviction proceedings

Petitioner contends that he is entitled to a *de novo* evidentiary hearing because his state court post-conviction proceedings were held while he was incompetent thus violating his due process rights. On October 15, 1987, petitioner filed a motion for post-conviction relief in the state trial court under Florida Rule of Criminal Procedure 3.850. In conjunction with his motion, petitioner filed a motion to stay the post-conviction proceedings on the ground that he was incompetent to assist his counsel with those proceedings. The state trial court conducted an evidentiary hearing and, on February 23, 1989, denied the motion for a stay. The court found that petitioner "does not suffer from a major mental illness" and that "he has the present ability to understand the proceedings and to assist counsel if he so chooses." R. 1008. The state trial judge also ruled, as a matter of law, that a capital defendant need not be competent to assist counsel in post-conviction proceedings. Id. Next, on June 19, 1990, following an evidentiary hearing on the merits, the

state court denied the petition for post-conviction relief. Pet's. Ex. F. The Florida Supreme Court affirmed the trial court's decision on February 6, 1992.

Now, in federal court, petitioner asserts that he had a constitutional right to be competent during his state post-conviction proceedings and that the state trial court erred and abused its discretion by finding him competent and able to assist counsel. This claim fails for two reasons. First, no federal constitutional right is violated by requiring a petitioner to proceed with his state post-conviction proceeding during a period of incompetence. Second, the state trial court's finding that petitioner was competent to proceed with his state post-conviction proceeding was fairly supported by the record in light of the evidence presented during the state court competency hearing.

One must remember that, "a state has no constitutional duty to provide post conviction remedies." Elzade v. Dretke, 362 F.3d 323, 331 (5th Cir. 2004) (quoting Millard v. Lynaugh, 810 F.2d 1403, 1410 (5th Cir. 1987)). Consequently, "errors in a state habeas proceeding cannot serve as a basis for setting aside a valid original conviction." Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995); see also, Alley v. Bell, 307 F.3d 380, 387 (6th Cir. 2002). Thus, any errors that may have taken place during petitioner's state post-conviction proceeding cannot provide a basis for the issuance of a federal writ of habeas corpus absent a violation of the federal constitution. See Nichols, 69 F.3d at 1275.

The Florida Supreme Court's decision in Carter explicitly holds that a petitioner's right to competency during post-conviction proceedings is derived solely from Florida's right to post-conviction

counsel. See Carter, 706 So. 2d at 875 (holding that "[u]nless a death-row inmate is [competent] to assist counsel . . . the right to collateral counsel, as well as the postconviction proceedings themselves, would be practically meaningless."). This reasoning has also been adopted in determining the right to competency in federal habeas proceedings. See Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) (holding that "the statutory right to counsel contemplates effective communication between lawyer and client.").

Again, it must be noted that there is no federal constitutional right to counsel in state post-conviction proceedings. See Coleman v. Thompson, 501 U.S. 722, 752-53 (1991). Indeed, federal courts have rejected the argument that, because a state provides a right to counsel on post-conviction review of death sentences, ineffective assistance of counsel in such a setting violates a petitioner's Fourteenth Amendment right to due process. See Ogan v. Cockrell, 297 F.3d 349, 347 (5th Cir. 2002). Finally, the federal statute authorizing petitioner's habeas petition explicitly states that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Thus, even if petitioner was incompetent during his state post-conviction proceedings, the only right violated would be petitioner's state law right to collateral counsel. Since federal courts have plainly held that violations of state law rights to post-conviction counsel do not implicate federal constitutional rights, petitioner's claim fails to raise a federal constitutional violation that can be remedied through a section 2254 petition.

Moreover, the state trial court's finding that petitioner was competent to proceed with his post-conviction proceeding was fairly supported by the record in light of the evidence presented during petitioner's competency hearing in 1988. It is axiomatic that "when reviewing a state court's finding of fact in a habeas case under pre-AEDPA law, we do not review for clear error; rather, we presume the correctness of the state court finding unless, inter alia, it is not fairly supported by the record." Quince v. Crosby, 360 F.3d 1259, 1267 (11th Cir. 2004). Acknowledging this standard, petitioner contends that the state court's finding of competency constituted an abuse of discretion since it was not fairly supported by the record. Therefore, petitioner asserts that the state court's finding is not entitled to a presumption of correctness pursuant to 28 U.S.C. 2254(d)(8) (1995).

During the 1988 competency hearing, the state trial judge considered testimony from three mental health experts who testified on petitioner's behalf -- Drs. James Merikangas, William Corwin, and Jeffrey Elenewski. These witnesses testified that petitioner suffered from a form of paranoid schizophrenia which creates a delusional system which did not allow petitioner to assist his counsel with his post-conviction proceeding. Conversely, the state presented testimony from Drs. Leonard Haber, Lloyd Miller, and Peritz Scheinberg. They testified that petitioner had no brain damage and was feigning memory difficulties when it suited his purposes. They also testified that it was extremely rare to simultaneously exhibit all of the types of delusions that petitioner claimed to experience. Thus, they concluded that petitioner was malingering symptoms

of schizophrenia to evade the imposition of the death penalty.

The state also presented testimony from several collateral witnesses who spent time with the petitioner in a correctional setting -- Richard Barrick, Janice Smith, Eddie Ford, Kenneth Williams, and Mark Ford. These witnesses collectively testified that petitioner had polite, cogent, and non-delusional conversations with them and that he was not a prisoner who appeared to be exhibiting symptoms commonly associated with mental illness. See Pet.'s Ex. I. The state trial court found that petitioner "does not suffer from a major mental illness" and that "he has the present ability to understand the proceedings and to assist counsel if he so chooses." R. 1008.

After reviewing the transcript of the 1988 competency hearing, the exhibits, and the arguments in the briefs, this court finds that the state trial court's conclusion that petitioner was competent to assist counsel with his state post-conviction proceeding is fairly supported by the record. This court therefore finds that even if petitioner had a constitutional right to competency during his state post-conviction proceedings, there is fair support on the record for the state court's finding that petitioner was competent during those proceedings. Accordingly, the court finds no basis upon which to vacate petitioner's conviction or sentence or to schedule an additional evidentiary hearing on this matter.

B. Petitioner's claim that his due process rights were violated because the judge in the Carol City trial failed to conduct a Pate hearing and failed to find that petitioner was incompetent to stand trial

Petitioner contends that substantial evidence before the court in the Carol City trial raised a bona fide doubt as to his competency to stand trial. Thus, he claims that the trial court violated his procedural due process rights under Pate v. Robinson, 383 U.S. 375 (1966), by failing to conduct a competency hearing. Additionally, petitioner claims that his substantive due process rights were violated because he was tried while incompetent.

As to petitioner's Pate claim, this claim is procedurally barred because it was not raised on direct appeal. The Eleventh Circuit held in Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995), that "[a] Pate claim 'can and must be raised on direct appeal' . . ." (quoting James v. Singletary, 957 F.2d 1562, 1569-70 (11th Cir. 1992)). If a Pate claim is not raised on direct appeal, the federal courts are prohibited from considering the merits of this claim unless the petitioner can show cause for his default and prejudice resulting therefrom. See Medina, 59 F.3d at 1111 (citing Wainwright v. Sykes, 433 U.S. 72 (1977)). Petitioner's counsel have not attempted to proffer a basis for this court to find that cause exists to overcome the procedural default. Thus, petitioner's Pate claim is procedurally barred.

As to petitioner's claim that his substantive due process rights were violated because he was tried in the Carol City case while incompetent, this court holds that petitioner has not presented clear and

convincing evidence creating a real, substantial, and legitimate doubt as to his competency to stand trial in the Carol City case; that he is not entitled to an evidentiary hearing; and that his substantive competency claim is without merit. The Eleventh Circuit addressed this issue in Medina and held that:

> [a] petitioner may make a substantive competency claim by alleging that he was, in fact tried while mentally incompetent. [James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992)]. In contrast to a procedural competency claim, however, "a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence." Id. A petitioner who presents "clear and convincing evidence" creating a "real, substantial and legitimate doubt" as to his competence to stand trial is entitled to a hearing on his substantive incompetency claim. Id. at 1573 (quoting Fallada, 819 F.2d 1564, 1568 (11th Cir. 1987)). To show entitlement to a postconviction evidentiary hearing on a substantive competency claim, "the standard of proof is high [and] the facts must positively, unequivocally, and clearly generate the legitimate doubt." Card v. Singletary, 981 F.2d 481, 484 (11th Cir. 1992) (quotations omitted). A presumption of correctness attaches to a state court's finding of competence and a federal habeas court must determine that the finding is not "fairly supported by the record" before it may overturn the state court's decision. Id.

(citing Demosthenes v. Baal, 495 U.S. 731 (1990)).

Medina, 59 F.3d at 1106. The trial judge in the Carol City case conducted two separate competency hearings (described in detail below) and found that petitioner was competent to stand trial. Thus, the issue for this court's determination is whether the state trial court's finding of competency to stand trial is entitled to a presumption of correctness.

To determine whether the state court's finding of competency to stand trial is fairly supported by the record, this court has reviewed the evidence before the state court prior to, during, and after the Carol City trial. On April 13, 1978, petitioner, through counsel, submitted a plea of not guilty by reason of insanity. (App. KK - Vol. 1 at 30). On April 24, 1978, upon a motion made by defense counsel, the trial court entered a written order appointing three experts to examine petitioner and render: 1) a general report as to his mental condition; 2) an opinion on his competency to stand trial; 3) an opinion on whether he was insane at the time of the offense; and 4) an opinion as to whether he should be accorded psychiatric treatment. These experts were Drs. Harry Graff, Albert Jaslow, and Charles Mutter. (App. KK - Vol. 1 at 46).

The three doctors issued separate reports. Dr. Graff concluded that petitioner "is really not psychotic and is, in fact, either suffering from what we call a Ganser syndrome or is in fact malingering." (App. NN - Vol. 6 at 809). Dr. Graff added that petitioner was "able to answer charges against him and aid in his own defense and stand trial." Id. at 810. Dr. Jaslow concluded that petitioner "was basically competent and capable of answering the

charges and assisting in his defense, despite the fact that he was presenting a picture of some limitations and inadequacy." (App. NN - Vol. 6 at 813). Dr. Mutter concluded that petitioner was "exaggerating his symptoms on a conscious level to make me believe that he is sicker than he actually is." Id. at 803. Furthermore, Dr. Mutter opined that petitioner had the "ability to aid counsel in the preparation of his defense and stand trial." Id. at 803-04.

Based on this evidence, the state trial court found petitioner competent to stand trial. The Carol City trial began on May 22, 1978. Three days later, the jury returned verdicts of guilty. Subsequently, on August 11, 1978, petitioner's appellate counsel filed a motion for new trial, alleging that petitioner had been incompetent to stand trial and was incompetent to assist counsel during the appellate process. As a result, on August 22, 1978, the trial court held a competency hearing for both the Carol City case and the upcoming trial for the Hialeah case.

During this hearing, petitioner called three doctors to testify that he suffered from paranoid schizophrenia and was incompetent to stand trial. Drs. Syvil Marquit, Jeffrey Elenewski, and Arthur Stillman all testified that petitioner was suffering from persecutory delusions and was actively psychotic. (App. KK - Vol. 4). The state recalled Drs. Graff and Jaslow, and also called Dr. Paul Jarrett, each of whom testified that petitioner might have some mental disabilities but was nonetheless competent to understand the proceedings against him and to assist his attorney with his defense. Id. Furthermore, in both competency hearings, the state also called Dr. Norman Reichenberg, a psychologist who had performed extensive psychological testing

on petitioner. Dr. Reichenberg opined that the repeated psychological tests administered to petitioner revealed that he was a sociopath with behavioral disorders. Id. Dr. Reichenberg concluded that petitioner could aid in his own defense and understand the proceedings against him, and that his failure to cooperate with counsel was a conscious choice not based upon a mental illness. Id.

Upon reviewing the evidence before the state trial court prior to, during, and after the Carol City trial, this court finds that the state court's determination of competency was fairly supported by the record. There was objective evidence that petitioner's psychological tests revealed normal intellectual functioning and cognition. (App. NN. - Vol. 6). Furthermore, there was testimony from four doctors on behalf of the state which the state court found more credible than the testimony from the defense experts. There was no evidence that the state's doctors' opinions were professionally inadequate or had no basis in fact. See Medina, 59 F.3d at 1112. Thus, in this situation, there is no basis to disturb the state court's competency determination. Accordingly, the court finds that petitioner's substantive due process claim is without merit and provides no basis for relief in this case.

C. Claim that the decision in Riggins v. Nevada, 504 U.S. 127 (1992), mandates a new sentencing hearing because petitioner was involuntarily administered anti-psychotic drugs during trial and sentencing

Petitioner contends that Riggins mandates that a new sentencing hearing be conducted in his case because the state interfered with his defense, in

violation of his due process rights, by medicating him with powerful anti-psychotic drugs, over his objections, during his trials and sentencing proceedings. This court need not determine whether Riggins is retroactively applicable to petitioner's case because the record evidence unequivocally establishes that petitioner accepted the anti-psychotic medication voluntarily.

In Riggins, the United States Supreme Court held that a pretrial detainee has a due process interest in avoiding ***involuntary*** administration of antipsychotic drugs. Id. at 128 (emphasis added). The court added that once a detainee ***moves*** to terminate treatment, the state is obligated to establish both the need for antipsychotic drugs and their medical appropriateness. Id. (emphasis added). Petitioner contends that his sentencing hearings violated his due process rights because he was sentenced while medicated with multiple antipsychotic drugs.

In 1999, the Florida Supreme Court considered this exact issue in the context of petitioner's state habeas corpus proceeding. See Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993). The Florida Supreme Court found that petitioner had accepted the antipsychotic medication voluntarily, and that his counsel never requested that the medication be discontinued. Id. at 56. Indeed this was a significant holding because courts have concluded that Riggins is inapplicable in cases where a defendant voluntarily agrees to take antipsychotic medication. See United States v. Estrada, 59 Fed. Appx. 372, 375 (2d Cir. 2003); People v. Bradford, 15 Cal. 4th. 1229, 1361 (Cal. 1997).

As noted earlier, factual findings by state courts are entitled to a presumption of correctness. See Thompson v. Keohane, 516 U.S. 99, 110 (1995). In this case, while the state court's finding of "voluntariness" is a matter for independent federal determination, the state court's factual finding that petitioner never requested that his medication be discontinued is presumed correct unless it is not fairly supported by the record. Id. at 111-12.

Nevertheless, even after a *de novo* review of the record, it is clear that no Riggins violation occurred in petitioner's case. First, petitioner's counsel before this court has conceded that petitioner never personally asked to have his medication discontinued. In fact, there is undisputed record testimony that petitioner became upset in jail after ***not*** receiving his antipsychotic medication. (Resp. App. LL - Vol. 4). Ann Bell, the head nurse at the Dade County jail clinic, testified that petitioner "was angry that he was not receiving his medication and he was, you know, demanding the same as any other person would be, if you were receiving medication and all of a sudden couldn't get it." Id. Furthermore, the record establishes that petitioner's medication was passed into his cell and, he was never monitored to see whether he actually ingested the medication. Id. This fact is critical because, unlike Riggins, it establishes that petitioner ingested antipsychotic medication on his own volition.

Despite this, petitioner contends that he was not competent to voluntarily accept antipsychotic medication. This argument also fails because, as discussed above, the state court found petitioner competent to stand trial. Thus, there is no basis to conclude that he was incompetent to voluntarily

accept medication. See e.g., Godinez v. Moran, 509 U.S. 389 (1993). Finally, the record evidence also fails to support the petitioner's contention that his counsel objected to the administration of antipsychotic drugs during petitioner's sentencing. The Florida Supreme Court spoke to this point when it accurately noted:

> [t]he only even arguable request came at the very end of the original Hialeah sentencing proceeding, when counsel renewed his argument that Ferguson was incompetent and noted that he was receiving a significant amount of medication for his condition. Counsel then suggested that the court might want to sentence Ferguson when he was withdrawn from the medication. We do not construe this as a request that Ferguson be taken off the medication before sentence was pronounced. In any event, if the trial court erred in sentencing Ferguson while he was on medication, since the sentence was then vacated on appeal, the error was rendered moot. Counsel did mention Ferguson's medication at the resentencing proceeding, but this was in the context of mitigation and Ferguson's mental condition; there was no request at that time that the medication be discontinued.
>
> In a supplemental record submitted with this petition, there is an affidavit from trial counsel in which he asserts that he asked on at least two other occasions to have the medication discontinued. These requests are not reflected in the record and were evidently not transcribed. Even assuming

> that counsel's statements are accurate, this is a far cry from the situation in Riggins, where the medication was forced upon the defendant and counsel objected to the medication's effect on the defendant's demeanor at trial and on the witness stand and alleged that it tainted their defense of insanity. Here, the medication was not involuntary, and the only alleged effect was that it supposedly rendered Ferguson incompetent to stand trial. Ferguson's competency was extensively litigated previously, and the trial court's determination that he was competent was affirmed by this Court on direct appeal.

Ferguson, 632 So. 2d at 56-57. After reviewing the record in its entirety, this court finds that the evidence establishes that, unlike Riggins, petitioner was never medicated against his will and never specifically requested, or had his attorneys request, to be taken off of antipsychotic medication. Accordingly, the court finds that petitioner's Riggins claim does not provide a basis for habeas corpus relief in this case.

II. Claims regarding constitutional errors affecting petitioner's trials and post-conviction proceedings

A. Claim that petitioner's state post-conviction proceedings were so tainted by constitutional violations that they failed to provide a full and fair hearing

Petitioner contends that he did not receive a full and fair state post-conviction proceeding and, thus, is

entitled to a *de novo* federal evidentiary hearing. He posits two separate bases upon which this court should order a *de novo* evidentiary hearing. First, petitioner contends that the state courts improperly considered and ruled upon his post-conviction motions while he was incompetent. For the reasons set forth earlier, this claim is without merit and need not be discussed further.

Second, petitioner alleges that *ex parte* communications between the assistant state attorneys and the trial judge presiding over his state post-conviction proceedings deprived him of a full and fair hearing. Consequently, petitioner asserts that the trial judge's findings in the state post-conviction proceedings are not entitled to a presumption of correctness. See Quince v. Crosby, 360 F.3d 1259, 1262 (11th Cir. 2004). To determine whether this claim provides a basis for a *de novo* federal evidentiary hearing on any of petitioner's state post-conviction claims, the court first explains the factual and procedural background underlying petitioner's claim.

Petitioner filed his state post-conviction motion (3.850) on October 15, 1987. This case was originally assigned to the Honorable Ronald M. Friedman. In January 1988, petitioner's attorneys first learned from an assistant state attorney of an *ex parte* communication between counsel for the state and Judge Friedman. This communication pertained to the rescheduling of psychiatric examinations by three doctors because petitioner's counsel had missed the first examinations due to lack of notification of the dates of testing. (App. NN - Vol. 11). Upon learning of the ex parte communication, petitioner's

counsel voiced his objection to the assistant state attorney.

Subsequently, and unrelated to petitioner's counsel's objection, the case was reassigned to the Honorable Arthur I. Snyder. On May 18, 1988, Judge Snyder held a hearing at which he expressed dissatisfaction with both parties' delays in complying with certain scheduling orders regarding petitioner's post-conviction proceedings. At the hearing, an assistant state attorney attributed the delays to the fact that petitioner's counsel "doesn't want us talking to the judge when he is not around. We can't fly him down here every time we have to ask the court a question" Id. In an attempt to expedite the scheduling of petitioner's psychological examinations and to ensure their completion prior to the date set for the post-conviction competency hearing, Judge Snyder stated "I know who to call and I know how to get the examination done the next day" Id. He added that "[y]ou want something done that I have ordered you to do and you want my help in doing it, just call me, okay? He [referring to petitioner's counsel] doesn't like it, that's okay. I never worry about ex parte because I don't ex parte anybody. If there is anything that ever has to be done, Mr. Prettyman, you'll be notified immediately." Id.

Thereafter, on May 24, 1988, petitioner's counsel learned from an assistant state attorney that she had another ex parte discussion with Judge Snyder. This caused a May 26, 1988 conference call during which petitioner's counsel reiterated his objection to ex parte communications between the court and counsel for the state. Judge Snyder responded that petitioner's counsel was "entitled to [his] opinion." Id. It is noteworthy that despite petitioner's counsel's

consistent objections, the petitioner took no steps to disqualify Judge Snyder in 1988. Rather, he waited for nine months until Judge Snyder, on February 23, 1989, denied petitioner's motion to stay post-conviction proceedings due to petitioner's alleged incompetency. Only then did petitioner move to disqualify the judge and vacate his orders on the basis of *ex parte* communications. Judge Snyder denied this motion on April 12, 1989.

Petitioner then sought a Writ of Prohibition from the Florida Supreme Court which denied the request on July 19, 1989. In a subsequent hearing before Judge Snyder, petitioner's counsel noted that he had received an *ex parte* telephone call from the judge regarding petitioner's presence at an upcoming hearing Id. Again petitioner's counsel voiced his continuing concern at the Judge's tendency to engage in *ex parte* communications. Judge Snyder responded by stating that "[t]he only time I ever speak to anyone is to find out if anything is going to happen. I don't talk about the facts of the case." Id.

Petitioner contends these *ex parte* contacts prevented him from having a full and fair post-conviction hearing in violation of his due process and sixth amendment rights. In evaluating this contention, this court starts from the premise that "*ex parte* communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding." Grieco v. Meachum, 533 F.2d 713, 719 (1st Cir. 1976). They should be avoided at all costs for they call into question the integrity of the judicial process. Given the seriousness of the matters at stake in this case, one would have hoped for more diligent compliance with such a fundamental ethical norm. But the facts are as they

stand and this court must evaluate them understanding that "such conduct may, in some circumstances, constitute a deprivation of due process of law." Id.

Several federal appellate courts, however, have held that *ex parte* communications are not a per se violation of a defendant's due process rights absent a showing that the fact-finder's determination of the issues in the case was infected by the communications. See Grieco, 533 F.2d at 719 (1st Cir. 1976); United States v. Walsh, 700 F.2d 846, 858 (2d Cir. 1983). Furthermore, the Ninth Circuit has held that when ex parte "telephone call[s] between the judge and the prosecutor . . . [were] confined to procedural matters [and] [t]he conversation did not touch upon legal issues pending before the court . . . [t]his type of ex parte communication does not amount to a constitutional violation" United States v. Porter, 967 F.2d 322 (9th Cir. 1992). It is settled law in Florida and in the federal courts that even though:

> a judge is not to have any substantive communication with counsel for any party, including counsel for the State, unless such communication is expressly authorized by statute or rule . . . [if a] motion to recuse was based . . . upon allegations pertaining to . . . scheduling . . . the trial court [does] not err in denying the motion as legally insufficient.

Lebron v. State, 799 So. 2d 997, 1019 (Fla. 2001); United States v. Porter, 967 F.2d 322 (9th Cir. 1992).

The cases above are directly applicable to petitioner's case. There is no evidence in this record to contradict the state trial court's assertion that the

ex parte communications were strictly limited to scheduling issues. Moreover, nothing in the record suggests that the trial court's factual determinations were in any way affected by any *ex parte* communications with counsel for the state. Accordingly, the trial court's factual determinations are entitled to a presumption of correctness so long as they are fairly supported by the record in light of the evidence presented. See Quince v. Crosby, 360 F.3d 1259, 1267 (11th Cir. 2004).

B. Claim that the state's failure to disclose Brady impeachment evidence at trial violated petitioner's due process rights

Petitioner asserts that the state violated his due process rights under Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose that three prosecution witnesses at the Carol City and Hialeah trials -- detectives Robert Derringer, Charles Zatrapalek, and Michael MacDonald -- were themselves under investigation for drug trafficking, conspiracy, theft, and civil rights violations. Two years after petitioner's convictions, state and federal authorities revealed that, between 1978 and 1979, they had been conducting an extensive, long-term investigation of drug-related criminal activity by detectives assigned to the homicide section of the Dade County Public Safety Department. This criminal activity culminated in a 40-count federal indictment and numerous convictions in United States v. Alonso, 740 F.2d 862 (11th Cir. 1984). Testimony at the Alonso trial established drug-related criminal conduct on the part of detectives/defendants Derringer, Zataepalek, and MacDonald. Only detective Derringer was convicted of unlawfully appropriating

property and income tax evasion. Detective Zatrapalek testified against detective Derringer during the Alonso trial.

In Brady, the Supreme Court held that suppression by the state of material evidence favorable to an accused violates the requirements of due process guaranteed by the Constitution. Brady, 373 U.S. at 87. The Eleventh Circuit has adopted a four-prong test to determine whether a Brady violation has occurred. See United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992). A defendant must show: (1) that the government possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it with any reasonable diligence; 3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been revealed to the defense, there is a reasonable probability that the outcome of the proceedings would have been different. United States v. Vallejo, 297 F.3d 1154, 1162 (11th Cir. 2002). Petitioner asserts that had the jury known that the officers who testified against him during his trials were suspected of criminal activity, this information would have been relevant in evaluating the testimony of these officers when they stated that petitioner had orally confessed to the murders for which he was charged. Consequently, the jurors might have either found him not guilty or have imposed a sentence other than the death penalty.

The state's initial response is that the Eleventh Circuit's opinion in Breedlove v. Moore, 279 F.3d 952 (11th Cir. 2002), completely disposes of all of petitioner's Brady claims. In Breedlove, the court addressed the post-AEDPA Brady claims of a death-

row inmate petitioner who claimed that the state failed to disclose material information relating to these same officers' criminal conduct. In Breedlove, the Eleventh Circuit simply held that appellant could not demonstrate that the Florida Supreme Court had been unreasonable in holding that the evidence allegedly suppressed by the state was inadmissible, and thus immaterial for Brady purposes. Id. at 964. However, the analysis for this court regarding petitioner's pre-AEDPA petition is different. Rather than addressing whether the state court unreasonably applied a clearly established federal law as determined by the United States Supreme Court, "[u]nder pre-AEDPA review standards, a federal habeas court owes no deference to a state court's resolution of mixed questions of constitutional law and fact." See Hardwick v. Crosby, 320 F.3d 1127, 1160 (11th Cir. 2003).

In the case at bar, the state trial court rejected petitioner's Brady claim for several reasons: (1) the evidence concerning the officers' involvement in unrelated criminal activities was not material under United States v. Bagley, 473 U.S. 667 (1985); (2) the evidence had not been in the state's possession for Brady purposes, as there was no showing that the Dade County State Attorney's office or any other state investigating agency had actual knowledge of the officers' alleged criminal activity at the time of the petitioner's trials; and (3) there was no reasonable probability that the evidence, even if admissible, would have affected the outcome of the proceedings. (App. IV - Vol. 19). The Florida Supreme Court affirmed the trial court's denial of petitioner's 3.850 motion, summarily rejecting his

Brady claim as without merit. Ferguson v. State, 593 So. 2d 508, 513 (Fla. 1992).

This court finds that each of the state trial court's conclusions serve an independent basis for this court to rule that petitioner's Brady claim does not provide a basis for the granting of a writ of habeas corpus. First, as to the argument that the impeachment evidence was not material, petitioner contends that this evidence could have been used to establish that the officers had a motivation to frame him in order to cover up their own criminal acts or to curry favor with the government. However, as the Eleventh Circuit has previously recognized in Breedlove, 279 F.3d at 964, and in Delap v. Dugger, 890 F.2d 285, 299 (11th Cir. 1989), "evidence of unrelated illegal activity by a police officer testifying for the state would likely not have been admissible under Florida's law of evidence, and thus immaterial for *Brady* purposes."

Furthermore, the Eleventh Circuit has noted that, "[t]he Florida Supreme Court is the final arbiter of Florida evidentiary law; federal courts must respect that law absent a constitutional violation." Breedlove, 279 F.3d at 963. (citing Hunt v. Tucker, 93 F.3d 735, 737 (11th Cir. 1994)). In Breedlove, the Florida Supreme Court held that evidence of the officers' activities was not material because it would not have been admissible under Florida law. Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991). The Florida Supreme Court reasoned that because Breedlove's trial and sentencing was completed by April 1979, any evidence related to the officers' criminal acts would not have been admissible because the officers did not know that they were under investigation until November 1979. Breedlove

v. State, 580 So. 2d at 609. Specifically, the Florida Supreme Court reasoned that:

> [i]f the detectives had been formally charged with or tried for the activities Breedlove now complains about and, thus, arguably curried favor by their testimony or if they had been under investigation for police brutality or using excessive force, questions designed to impeach them by showing bias, motive, or prejudice would have been relevant to whether they coerced Breedlove's confessions. In fact, however, the detectives' criminal activities were collateral to any issues in Breedlove's trial, and questions about them would not have promoted the ends of justice. Such questions would not have been permissible, and, thus, there is no reasonable probability that the outcome of the suppression hearing or the trial would have been different.

Id. This analysis also applies to petitioner's case. Indeed, the timing of his case is more compelling than the timing in Breedlove. Petitioner was convicted of his crimes ***prior*** to November 1978. Thus, an assertion that the officers may have been biased in petitioner's cases, which concluded over a year before they knew they were under investigation, is simply without merit for the same reasons as explained by the Eleventh Circuit and the Florida Supreme Court in Breedlove and by the state trial court in petitioner's 3.850 proceeding. Since this type of evidentiary exclusion has not been found unconstitutional by the Eleventh Circuit in either Breedlove or Delap, this court finds no legal basis for

declaring Florida's evidentiary ruling to be unconstitutional.

Second, this court finds that the impeachment evidence was not in the state's possession as that term is understood for Brady purposes. The petitioner has not pointed to any evidence that suggests the prosecution knew, either actively or constructively, of the officers' criminal activities. The court acknowledges that typically "the prosecution is considered a unitary entity, and favorable information possessed by the police but unknown to the prosecutor is nonetheless subject to the Brady test." Breedlove, 279 F.3d at 961 (citing Kyles v. Whitley, 514 U.S. 419, 437 (1995)). Nevertheless, in this case, petitioner cannot impute the officers' knowledge of their own illegal activities to the state for Brady purposes. Even though an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," Moon v. Head, 285 F.3d 1301, 1309 (11th Cir. 2002) it is also true that "one governmental entity's possession of favorable information should not necessarily be imputed to another." Id. 1309-10 (citing United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)).

In petitioner's case, the prosecution could only have learned about the officers' illegal activities during the time of petitioner's trial by directly asking these officers whether they had any evidence that was favorable to petitioner. In order for these officers to have fully complied with the prosecution's inquiry, they would have been required to make self-incriminating statements to the prosecutor. In this case, petitioner's right to the Brady material

conflicted with the officers' Fifth Amendment right not to disclose their criminal behavior to the prosecutor. Courts have consistently recognized that the right to obtain exculpatory evidence does not trump the right to compel a witness to waive their fifth amendment privilege. United States v. Thornton, 733 F.2d 121 (D.C. Cir. 1984); United States v. Jackson, 915 F.2d 359 (8th Cir. 1990). Thus, petitioner's Brady claim also fails because the impeachment evidence was not in the state's possession.

Finally, this court also finds that the results of petitioner's proceedings would have been the same regardless of whether the officers' testimony had been impeached. See Delan, 890 F.2d at 299. It is noteworthy that petitioner was granted a full evidentiary hearing on his Brady claims and failed to adduce any evidence to support his allegations that the officers might have been somehow involved in petitioner's crimes.

In the Carol City trial, the impeachment evidence in contention would not have affected the proceedings. There was independent eyewitness evidence from Margaret Wooden, a surviving victim, identifying petitioner as the perpetrator. Furthermore, there was also testimony from Adolphus Archie, the wheelman in the crime, unequivocally implicating petitioner. Finally, there was independent evidence that petitioner was arrested with the murder victim's gun in his possession. Thus, in the Carol City trial, the unavailability of the impeachment evidence does not undermine this court's confidence in the outcome of the proceedings. (App. NN - Vol. 19).

In the Hialeah trial, the unavailability of the impeachment evidence also does not serve to undermine the outcome of the trial. First, officers other than those in question unequivocally connected petitioner with the murder weapon. Second, sperm and pubic hair found in the victim was consistent with petitioner's sperm and pubic hair. Furthermore, glitter found in petitioner's apartment exhibited the same characteristics as glitter found in the victim's car. Finally, petitioner's girlfriend, Virginia Polk, offered uncontroverted testimony that, on the night of the homicides, petitioner went out, came home near midnight, and then washed his clothes the next day, which was unusual. (App. NN - Vol. 19). Thus, for all of these reasons, the court finds that petitioner's Brady claim fails to state a basis for the granting of a writ of habeas corpus.

C. Claim that the state used unconstitutional race-based preemptory challenges to which ineffective defense counsel failed to object

Petitioner contends that the state used unconstitutional race-based peremptory challenges to exclude all African-American jurors from both of his trials and that his counsel rendered ineffective assistance by failing to object. He asserts that reasonable defense attorneys in the Miami area were aware that prosecutors might engage in race conscious jury selection practices and would have objected to these practices even before the United States Supreme Court announced its decision in Batson v. Kentucky, 476 U.S. 79 (1986). The Eleventh Circuit addressed this issue in the death penalty habeas context in Baldwin v. Johnson, 152

F.3d 1304 (11th Cir. 1998). The Baldwin court held that:

> [a]t the time of Baldwin's trial, Swain v. Alabama, 380 U.S. 202 (1965) . . . governed challenges to prosecutorial use of peremptory strikes to remove blacks from a jury. To state a claim under Swain, it was not enough for a defendant to show that the prosecutor removed blacks from his or her particular jury . . . . The defendant had to demonstrate that the prosecutor, over time, systematically excluded blacks from serving on petit juries.

Baldwin, 152 F.2d at 1315. In Baldwin, the court held that the petitioner failed to show that the prosecutor's actions in his case constituted part of a systematic practice of exclusion and thus denied relief on petitioner's retroactive Batson claim. Id. Similarly, in petitioner's case, the defense counsel testified during a state evidentiary hearing that he could not say that the prosecutor systematically excluded African-Americans from serving on petit juries. (App. NN - Vol. 17). Thus, petitioner's Batson claim is barred for the same reasons as expressed in Baldwin.

Furthermore, the record is devoid of evidence that any prejudice resulted from the prosecutor's use of peremptory strikes in petitioner's case. See Baldwin, 152 F.3d at 1315. In fact, as petitioner concedes, although "the State exercised peremptory challenges to remove black jurors who had no moral, religious, or conscientious objection to the death penalty, . . . [it] at the same time, . . . allowed eight white persons to be impaneled even though each of the eight had expressed objections to the death penalty." Pet. at 95.

Therefore, even if this court were to assume that unconstitutional race-based peremptory strikes were utilized, this court cannot conclude that the outcome of the proceeding would have been more favorable to the petitioner had defense counsel lodged a timely objection. See Baldwin, 152 F.3d at 1315.

III. Claims regarding constitutional errors affecting petitioner's sentencing proceedings

A. Claim that petitioner's right to effective assistance of counsel was denied by his attorneys' failure to investigate and present compelling and readily available mitigating evidence at sentencing

Petitioner contends he received ineffective assistance of counsel at his sentencing proceedings because his attorneys failed to investigate and introduce mitigating evidence relating to his mental health and family history as mandated in Wiggins v. Smith, 539 U.S. 510 (2003). In evaluating this claim, the court notes that in pre-AEDPA petitions, "claims alleging ineffective assistance of counsel are mixed questions of law and fact and are reviewed de novo." Allen v. Woodford, 395 F.3d 979, 992 (9th Cir. 2004).

Petitioner asserts that the following mitigating evidence could and should have been presented during the sentencing phase of his trials. 1) He suffered from serious mental disorders and was placed in psychiatric facilities during the 1970s; 2) He spent his childhood in dire poverty; 3) He was rejected by his mother in favor of her boyfriends; 4) He received little parental love or guidance as a child or as an adolescent; 5) He was forced to defend his

mother against the violent attacks from a boyfriend who he thought was his stepfather; 6) His father died of alcohol related illness when he was thirteen years old; 7) He remained devoted to his mother and his siblings despite childhood difficulties; 8) He was shot four times by a police officer at age 21, causing serious physical and mental injuries; and 9) His father was an abusive alcoholic. Pet's Brief at 100-13.

It is settled law that a defendant "has a right -- indeed, a constitutionally protected right -- to provide the jury with mitigating evidence." Allen, 395 F.3d at 1000 (citing Williams v. Taylor, 529 U.S. 362, 393 (2000)). Furthermore, "to perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to present and explain the significance of all the available mitigation evidence." Id. Thus, it is now the responsibility of this court to assess whether "the decision of [petitioner's] counsel not to investigate or present certain mitigating evidence was 'the result of reasonable professional judgment,' in light of all of the circumstances, 'applying a heavy measure of deference to counsel's judgments.'" Id. (citing Strickland v. Washington, 466 U.S. 668, 690 (1984), or whether it constituted ineffective assistance.

Furthermore, should this court determine that counsel's performance was deficient, petitioner nonetheless "must establish a reasonable probability that, but for his counsel's deficient performance, the result of the proceedings would have been different." Rutherford v. Crosby, 385 F3d 1300, 1308 (11th Cir. 2004) (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "Both

showings are necessary for any relief; failure to establish either is fatal and makes it unnecessary to consider the other." Id. In evaluating this claim, the court notes that in pre-AEDPA petitions, "claims alleging ineffective assistance of counsel are mixed questions of law and fact and are reviewed de novo." Allen v. Woodford, 395 F.3d 979, 992 (9th Cir. 2004). As to petitioner's case, this court finds that trial counsel's actions were neither deficient nor prejudicial under the analysis in Strickland and Wiggins.

1. **The Carol City Trial**

First, petitioner asserts that during the Carol City trial, trial counsel provided ineffective assistance by failing to provide the jury with mitigation evidence regarding his mental health and family background. This court has reviewed the arguments by both parties, the record in the case, and the previous state court decisions on this issue. This court finds that petitioner's trial counsel's actions in the Carol City trial were the result of reasonable professional judgment.

Contrary to petitioner's assertions, this is not a case in which trial counsel failed to conduct any investigation into petitioner's history of mental illness. In the Carol City trial, a hearing was conducted to determine petitioner's competency to stand trial. By virtue of the information garnered in that proceeding, trial counsel was made aware of petitioner's mental health condition going back to 1971. Defense counsel, Fred Robbins, Esq., testified at the 3.850 hearing that he did not present mitigating evidence about petitioner's mental health because he did not want to open the door to the state's evidence that petitioner was anti-social,

malingering, and exceedingly dangerous. (App. NN - Vol. 17). This court finds that trial counsel's decision not to present mental health mitigating testimony was a reasonable tactical decision made to avoid potentially greater prejudice from damaging information that would have been introduced to the jury regarding the petitioner's malingering and anti-social personality disorder. See e.g., Foster v. Johnson, 293 F.3d 766, 778-82 (5th Cir. 2002).

As for petitioner's family background, it is evident from the testimony of the petitioner's mother at the Carol City sentencing phase that defense counsel was aware that he was not limited in his presentation of non-statutory mitigating evidence. The record evidence establishes that trial counsel contacted petitioner's sister and mother to confer about the case. (App. NN - Vol. 17). Counsel's decision to pursue a strategy of lingering and residual doubt about petitioner's guilt, rather than attempting to introduce evidence that implied guilt but attempted to excuse petitioner's conduct, was a reasonable tactical decision given counsel's reasonable investigation into petitioner's background. See e.g., Smith v. Dugger, 840 F.2d 787, 795 (11th Cir. 1988).

Furthermore, even if counsel's decisions: 1) not to present expert testimony on petitioner's mental condition; and/or 2) not to present more evidence of petitioner's family background, were below the standard of a reasonably competent attorney, these errors would not undermine this court's confidence in the outcome of petitioner's proceedings. The relevant question for determination today is whether "knowledge [of petitioner's omitted mitigating evidence] would have been enough that even one

juror would have weighed it more heavily than the mountain of aggravating evidence." Allen, 395 F.3d at 1005. In this case, the following aggravating factors existed: 1) Petitioner had been convicted of three felonies involving the use or threat of violence at the time of the Carol City murders; 2) the Carol City murders were committed while petitioner was engaged in the commission of multiple robberies; 3) the Carol City murders were committed for the purpose of eliminating all of the witnesses to the crime of robbery in order to avoid lawful arrest; and 4) the Carol City murders were especially heinous, atrocious, and cruel. (App. MM - Vol. 3). Given the overwhelming aggravating factors in this case, the court finds there is no reasonable probability that the omitted mitigating evidence would have been enough to cause even one juror to weigh it more heavily than the aggravating factors. Thus, the court finds that the petitioner has failed to meet the second prong of the Strickland test with regard to the Carol City trial.

2. The Hialeah Trial

Petitioner also alleges that his trial counsel in the Hialeah case, Michael S. Hacker, Esq., provided ineffective assistance by failing to introduce any mitigation evidence during sentencing. Petitioner's claims are not supported by the record in this case. First, as to the lack of mental health mitigating evidence, petitioner's claim neglects the critical fact that his sanity was vigorously contested during the guilt phase of his proceedings. Numerous experts testified about his competency and his mental condition at the time of the offense. This explains defense counsel's argument that the jury should "examine very closely in [their] minds the testimony

of all the physicians. I think that you find that each and every one of them found this man has a major mental disorder. There is no question about that. He has had it since 1971. He had it in 1973 when he was examined and he had it in 1975." (App. LL - Vol. 6).

The United States Supreme Court addressed an analogous contention in Bell v. Cone, 535 U.S. 685 (2002). There, the court held that counsel was not ineffective for failing to re-introduce mental health evidence during the penalty phase of the trial that had been introduced during the guilt phase of the trial. Id. Specifically, the court held that even though "respondent faulted his counsel for not recalling his medical experts during the sentencing hearing . . . we think counsel reasonably could have concluded that the substance of their testimony was still fresh to the jury. Each had taken the stand not long before, and counsel focused on their testimony in his guilt phase closing argument, which took place the day before the sentencing hearing was held." Id. at 699. In petitioner's 3.850 hearing, defense counsel testified that the decision not to reintroduce the medical evidence at sentencing was based on the tactical decision that the jury had "already heard everything they were going to say and that to call them would be simply repeating themselves." (App. NN - Vol. 17). Thus, for the reasons expressed in Bell, this court holds that it was not unreasonable for petitioner's counsel to decide that it would be duplicative to reintroduce petitioner's mental health evidence during the penalty phase of the Hialeah trial.

As for petitioner's claim that defense counsel was deficient in failing to present evidence about

petitioner's family background, the court also finds this claim to be without merit. The record fairly supports the state trial court's findings that petitioner's attorneys met with his mother and his sisters. (App. NN - Vol. 17). Indeed, petitioner's mother was called to the witness stand during the penalty phase but was unable to testify because she became hysterical and nearly fainted. This court concurs with the Florida Supreme Court's reasoning that "[a]lthough counsel could have asked for a continuance to allow [petitioner's] mother to compose herself, the decision to withdraw this witness was certainly reasonable in light of her emotional state. There was no connotation that she was removed because she could have nothing good to say about her son." Ferguson v. State, 593 So. 2d 508, 511 (Fla. 1992). Accordingly, this court finds that petitioner's counsel's tactical decision to focus on mental health mitigators during sentencing, and to appeal to the jury's sense of sympathy for petitioner's mental health condition, was a reasonable strategy in attempting to persuade the jury not to impose the death penalty. See Bell, 535 U.S. at 700.

Finally, even if defense counsel's performance was deficient, the omission of the evidence in question would not undermine the confidence of the outcome of petitioner's proceedings. Allen, 395 F.3d at 1005. In this case, the trial court found the following aggravating factors to exist: 1) He had been convicted of three separate felonies involving the use or threat of violence at the time of the Hialeah murders and had also been convicted of the Carol City murders; 2) the Hialeah murders were committed while he was engaged in the commission of rape and robbery; 3) the Hialeah murders were

committed for the purpose of eliminating the only witnesses to the crime of robbery and rape in order to avoid lawful arrest; 4) the Hialeah murders were committed for pecuniary gain; and 5) the Hialeah murders were especially heinous, atrocious, and cruel. (App. MM - Vol. 1).

Given the overwhelming aggravating factors in the Hialeah case, the court finds that there is no reasonable probability that the omitted mitigating evidence would have been enough to cause even one juror to weigh it more heavily than the aggravating factors. Allen, 395 F.3d at 1005. Thus, the court finds that petitioner has failed to meet the second prong of the Strickland test with regard to the Hialeah trial.

B. Claim that petitioner's right to a fair sentencing was denied because of errors prohibited under Hitchcock v. Dugger, 481 U.S. 393 (1987)

Petitioner asserts that in both the Carol City and Hialeah trials, the trial court impermissibly limited the jury's consideration of non-statutory mitigating circumstances in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987). In Hitchcock, the United States Supreme Court held that a sentencer in a capital case "may not refuse to consider or be precluded from considering any relevant mitigating evidence." 481 U.S. at 394. However, in Jones v. Dugger, 867 F.2d 1277, 1279 (11th Cir. 1989), the Eleventh Circuit held that "[i]f the state can prove beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation, the error is harmless and the recommendation may stand." For ease of analysis, the court separates the Hitchcock claim in the Carol

City trial from the Hitchcock claim in the Hialeah trial.

1. Carol City Trial

Petitioner contends that the Carol City trial violated Hitchcock because the trial court instructed the jury that "the mitigating circumstances which you may consider, if established by the evidence are these: [listing the statutory factors]." (App. KK - Vol. 4). Petitioner asserts this instruction unconstitutionally limited the number and kind of mitigating circumstances that the jury could consider. The Florida Supreme Court evaluated this contention and concluded that the initial instruction was cured by a subsequent instruction which told the jury that "[t]he aggravating circumstances which you may consider are limited to those which I have just instructed you. However, there is no such limitation upon the mitigating factors which you may consider." Ferguson v. State, 593 So. 2d 508, 512 (Fla. 1992). Therefore, the court concluded that "the jury here was clearly instructed that they were not limited to consideration of the statutory mitigating circumstances, and there was no Hitchcock error." Id.

In Quince v. Crosby, 360 F.3d 1259, 1267 (11th Cir. 2004), the Eleventh Circuit held that "the Florida Supreme Court's statement that the sentencing judge did not limit his consideration to only statutory mitigating circumstances, is a finding of fact, and it should be upheld . . . [if] review reveals that the finding is fairly supported by the record." Applying this rule to the case at bar, and, after reviewing the record and the parties' briefs, this court holds that the Florida Supreme Court's finding that the jury was not limited in its consideration of mitigating

circumstances is fairly supported by the record. Thus, this court finds that petitioner's Hitchcock claim does not provide a basis for relief as to the Carol City trial.

2. **Hialeah Trial**

Petitioner's Hitchcock claim with regard to the Hialeah trial is more troubling because it is undisputed that the jury instructions "failed to adequately explain that the jury could consider nonstatutory mitigating evidence." Ferguson, 593 So. 2d at 512. Thus, this court must determine whether "the state can prove beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation." Jones, 867 F.2d at 1279. In analyzing whether the Hitchcock error was harmless, this court must examine whether "the nonstatutory mitigating evidence presented was so insignificant that it would not have altered the jury's decision." Id. at 1279-80. Since the determination of whether a Hitchcock error occurred is a legal question, the court shall review petitioner's claim de novo. Quince, 360 F.3d at 1267.

The only mitigating evidence before the jury pertained to petitioner's mental health and his difficult childhood. As noted, in the Hialeah case, the jury had already discounted the mental health evidence as to petitioner's claim that he was insane at the time of the offense. Furthermore, as discussed above, multiple serious aggravating factors existed in the Hialeah case. In light of the record evidence in this case, and despite the heavy burden imposed upon the respondent, the court finds that there is no possibility that the jury's recommendation would have been different had it been informed that it was

not limited to the statutory mitigating factors. In other words, this court finds that the Hitchcock error had no impact whatsoever and was harmless beyond a reasonable doubt. This court agrees with the Florida Supreme Court's holding that "[e]ven if the nonstatutory mitigating evidence introduced at the 3.850 hearing had been presented and the jury had been specifically told it should consider nonstatutory mitigation in the weighing process, we are convinced beyond a reasonable doubt that the outcome would be the same." Ferguson, 592 So. 2d at 513. Thus, petitioner's Hitchcock claims fail to state a basis upon which this court may issue a writ of habeas corpus.

C. Claim that petitioner's constitutional due process rights were violated through errors prohibited under Ring v. Arizona, 536 U.S. 584 (2002)

Petitioner contends that the imposition of his sentence violated his rights under Ring v. Arizona, 536 U.S. 584 (2002), because petitioner was re-sentenced by a judge without the benefit of a second jury recommendation. In Ring, the United States Supreme Court held that a jury, and not a judge, must make all findings of fact, including aggravating factors, that render someone eligible for the death penalty Id. at 609. It is settled law, however, that "Ring is not retroactive to death sentences that were imposed before it was handed down." Sibley v. Culliver, 377 F.3d 1196, 1208 (11th Cir. 2004) (citing Schriro v. Summerlin, 124 S. Ct. 2519 (2004)). Thus, "a petitioner may not appeal a conviction or bring a habeas attack based on Ring violations that occurred before Ring was handed down." Sibley, 377 F.3d at 1208. Petitioner's Ring related claims fail to

provide a basis upon which this court may issue a writ of habeas corpus. Furthermore, petitioner's claims under Corbett v State, 602 So. 2d 1249 (Fla. 1992), also fail because they solely implicate violations of Florida law. It is axiomatic that "habeas relief is not available for violations of state law." Neverson v. Farquharson, 366 F.3d 32, 45 (1st Cir. 2004) (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Furthermore, this court agrees with the Florida Supreme Court that petitioner's Corbett claims fail to state a basis upon which a writ of habeas corpus may be issued. Ferguson v. State, 632 So. 2d 53, 55 (Fla. 1993).

IV. Claims regarding other constitutional errors that allegedly affected petitioner's trials and sentencing proceedings

Petitioner asserts that other errors during his trials and sentencing proceedings violated his constitutional rights and, thus, necessitate the granting of habeas relief. First, petitioner asserts that the trial court's jury instructions on sanity in the Hialeah case unconstitutionally shifted the burden of proof to the petitioner during his trial. This claim, however, is procedurally barred because the jury instructions were not objected to during trial and the issue was not raised on direct appeal. See Rutherford v. Crosby, 385 F.3d 1300, 1318 (11th Cir.. 2004) (holding that "[w]hen a state prisoner is procedurally barred from raising an issue in his state collateral attack, he may not raise the issue in a federal habeas petition unless he can show both cause and prejudice, or fit within the narrow miscarriage of justice exception."); see also Ferguson v. State, 593 So. 2d at 513 (summarily denying petitioner's argument as being without merit).

Petitioner has not shown either cause or prejudice for the failure to raise this issue during trial or on direct appeal.

Petitioner also contends that the prosecution in the Carol City case elicited false testimony at sentencing and knowingly failed to correct it when officer Edward Hartmann testified that, following an October 1969 shooting incident involving himself and petitioner, petitioner was convicted of assault with intent to commit murder. Since petitioner had been acquitted of that charge, he contends that the state breached its duty to correct Hartmann's false testimony. This claim, however, is procedurally barred under the logic expressed by the Florida Supreme Court in Vining v. State, 827 So. 2d 201 (Fla. 2002) (holding that claims of this nature are barred when first raised in a 3.850 motion unless the error was unknown to both the defendant and his counsel). In this case, the record evidence establishes that petitioner's counsel was aware of the facts of petitioner's shooting incident and failed to object to Hartmann's false testimony. Second, petitioner's contention that his own incompetence prevented him from informing his attorneys as to the falsity of Hartmann's testimony cannot provide a basis for relief when the record evidence fairly supports the state trial court's finding that petitioner was competent to stand trial. Finally, even if the claim were not procedurally barred, this court finds beyond a reasonable doubt that this erroneous sentencing evidence constituted harmless error.

Petitioner also asserts that his re-sentencing violated the Eighth and Fourteenth Amendments because Florida's sentencing scheme failed to channel the judge's sentencing discretion. This claim

too is procedurally barred because this issue was not raised on direct appeal. See Rutherford v. Crosby, 385 F.3d 1300, 1318 (11th Cir. 2004) (holding that "[w]hen a state prisoner is procedurally barred from raising an issue in his state collateral attack, he may not raise the issue in a federal habeas petition unless he can show both cause and prejudice, or fit within the narrow miscarriage of justice exception."); see also Ferguson v. State, 593 So. 2d at 513 (summarily denying petitioner's argument as being procedurally barred and without merit). Petitioner has not shown either cause or prejudice for his failure to raise this issue.

Finally, petitioner asserts that he was deprived of his constitutional right to effective assistance of appellate counsel because his attorney failed to raise numerous trial errors that went unreviewed. In Heath v. Jones, 941 F.2d 1126, 1130-31 (11th Cir. 1991), the Eleventh Circuit held that "in evaluating whether the appellate counsel's performance was deficient, counsel's performance must be evaluated for 'reasonableness under prevailing professional norms.' " (citing Strickland, 466 U.S. at 688). The Court added that "the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue." Id. (citing Jones v. Barnes, 463 U.S. 745 (1983)). Rather, the court held that "even though a non-appealed issue might have been successful, the appellate advocacy had to be judged in its entirety." Id. (citing Smith v. Murray, 477 U.S. 527 (1986)).

Ruling in the first instance, this court finds that petitioner's appellate counsel was not deficient in that he raised arguments on appeal that were of the utmost importance to his case. These arguments

included that the lower court should have allowed an evidentiary hearing at re-sentencing, that the lower court erred in applying certain aggravating factors, and that petitioner's rights were violated when the lower court considered non-record evidence in his case. (App. G and H).

This court additionally finds that all of the alleged erroneously omitted arguments are without merit and, therefore, no prejudice resulted from their omission. See Cross v. United States, 893 F.2d 1287 (11th Cir. 1990). First, petitioner contends that appellate counsel was deficient in failing to challenge the trial court's findings that the murders were "heinous, atrocious, or cruel" and that the Hialeah killings had been "committed to avoid lawful arrest." A review of the record, however, supports the state trial court's findings on this issue. Since this argument would not have been meritorious on appeal, failure to raise the argument cannot constitute ineffective assistance. See Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994).

Second, petitioner contends that appellate counsel was ineffective for failing to appeal the Florida Supreme Court's ruling that a re-sentencing proceeding was not necessary in petitioner's case. The United States Supreme Court has addressed a case with analogous facts and indicated that a re-sentencing proceeding was not required under the facts of that case. See Sochor v. Florida, 504 U.S. 527 (1992); see also, Ferguson v. Singletary, 632 So. 2d 53, 57-58 (Fla. 1993). Thus, appellate counsel's failure to raise this argument does not constitute ineffective assistance. See Bolender, 16 F.3d at 1573.

Third, petitioner asserts that appellate counsel was ineffective for failing to challenge on appeal the trial court's finding that petitioner was competent to stand trial. The trial court's finding of competency in both trials is supported by the evidence and would not have been reversed on appeal. The Florida Supreme Court addressed this issue extensively in Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993). There, the court found that this argument lacked merit because "four experts had unanimously concluded only two weeks before the Carol City trial that Ferguson was competent, and three months after the Carol City trial another competency hearing was held and Ferguson was found to be competent." Id. at 58. This court agrees with the Florida Supreme Court's analysis. Therefore, appellate counsel's failure to raise this argument does not constitute ineffective assistance. See Bolender, 16 F.3d at 1573.

Fourth, petitioner contends that his appellate counsel was ineffective for failure to raise the requirement of proportionality of petitioner's sentence. Again, the Florida Supreme Court has considered this issue and found that "the death sentences are clearly proportionate." Ferguson, 632 So. 2d at 58. This court has reviewed the record and has also concluded that the facts of this case clearly establish that the death penalty is a proportionate sentence. Thus, appellate counsel's failure to raise this argument does not constitute ineffective assistance. See Bolender, 16 F.3d at 1573.

Fifth, petitioner contends that appellate counsel was ineffective for failure to raise the Hialeah trial court's error in permitting the Hialeah jury to separate during deliberations. Since there was no

contemporaneous objection in this case, the Florida Supreme Court was correct in concluding that this claim is without merit. See Pope v. State, 569 So. 2d 1241, 43-44 (Fla. 1990); Ferguson, 632 So. 2d at 58. Thus, appellate counsel's failure to raise this argument does not constitute ineffective assistance. See Bolender, 16 F.3d at 1573; see also Diaz v. Sec'y for the Dep't of Corr., 402 F.3d 1136 (11th Cir. 2005).

Sixth, petitioner contends that appellate counsel was ineffective because portions of the Hialeah trial record were missing during petitioner's direct appeal. Petitioner, however, subsequently gained access to the missing portions of the trial record prior to his state post-conviction proceedings. Even with these portions in his possession, he has been unable to demonstrate how he was prejudiced on direct appeal. See Ferguson, 632 So. 2d at 58. Accordingly, since no prejudice resulted from the missing pages of the Hialeah trial record, there is no violation of Strickland in this case.

Finally, petitioner contends that his appellate counsel was ineffective for failing to raise allegedly improper comments made by the prosecutor during the penalty phase of the Hialeah trial. Trial counsel did not object to the prosecutor's comments during sentencing. In Diaz v. Sec'y for the Dep't of Corr., 402 F.3d 1136 (11th Cir. 2005), the Eleventh Circuit held that "[u]nder Florida law, an error that passed without objection cannot be raised on appeal; appellate counsel, therefore, is not ineffective for failure to raise a meritless argument." Thus, this claim fails to state a basis upon which relief can be granted.

DECRETAL PROVISION

For the reasons expressed herein, it is hereby **ORDERED** and **ADJUDGED** that petitioners' second amended petition for a writ of habeas corpus [DE # 46] is **DENIED**. A final judgment shall be issued in a separate order.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 19th day of May, 2005.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-573-CIV-HURLEY/LYNCH

JOHN ERROL FERGUSON, or
DOROTHY FERGUSON, individually
and as Next Friend on behalf of
JOHN ERROL FERGUSON,

Petitioners,

v.

JAMES V. CROSBY, JR.,
SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS, STATE OF FLORIDA,

Respondent.

_____/

FINAL JUDGMENT DENYING
SECOND AMENDED PETITION
FOR WRIT OF HABEAS CORPUS

THIS CAUSE is before the court following entry of an order denying petitioners' second amended petition for writ of habeas corpus. This court hereby enters judgment, pursuant to Fed. R. Civ. P. 58, as follows:

FINAL JUDGMENT is entered against the petitioners, John Errol Ferguson and Dorothy Ferguson, for the reasons expressed in the court's memorandum opinions dated May 19, 2005. Petitioners' second amended petition for writ of

habeas corpus [DE # 46] is **DENIED**. All pending motions are **DENIED** as moot and the Clerk of the Court shall enter this case as **CLOSED**.

DONE and **SIGNED** in Chambers at West Palm Beach , Florida, this 19th day of May, 2005.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-13595-P & 05-13877-P

[Filed Dec. 31, 2009]

JOHN ERROL FERGUSON,
DOROTHY FERGUSON,
individually and as Next
Friend on behalf of
JOHN ERROL FERGUSON,

Petitioners-Appellants,

versus

SECRETARY FOR THE
DEPARTMENT OF CORRECTIONS,
Walter A. McNeil,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley L. Birch

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 2 9 2010
OFFICE OF THE CLERK

Case No. 09-1186

IN THE UNITED STATES SUPREME COURT

JOHN ERROL FERGUSON, ET AL.,
Petitioners,

v.

WALTER A. MCNEIL,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Respondent would rephrase the questions as follows:

I, II. Whether this Court should grant certiorari to review the denial of habeas relief on the issue of ineffective assistance of penalty phase counsel in a case which presents no significant or important federal question and whose result is not fairly debatable?

III. Whether this Court should review the harmless error analysis undertaken by the Florida Supreme Court and the Eleventh Circuit Court of Appeals on allegations of Hitchcock v. Dugger, 481 U.S. 393 (1987), error, where it is clear the error(s), under any reasonable view of the facts, could not have affected the outcome of Petitioner's penalty phases?

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183 (11th Cir. 2009).

JURISDICTION

This Court has jurisdiction pursuant to Title 28, United States Code, Section § 1254(1) to review the decision of the Eleventh Circuit Court of Appeals. However, Respondent submits that no question contained in the petition is worthy of this Court's consideration.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts the Petitioner's statement of the constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

I) Preliminary Statement And Comment On Petitioner's Facts

Petitioner, John Errol Ferguson, is currently incarcerated on Florida's death row on eight counts of first degree murder. The proceedings herein arise from Ferguson's two separate capital murder trials, hereinafter referred to as the Carol City murders, with six victims, and the Hialeah murders, with two victims.

Petitioner's statement of facts and introduction are selective, in some instances misleading, and, contain the argument of counsel.[1] The Respondent therefore generally disagrees with both the facts and legal argument contained therein.

Petitioner selectively notes that several court appointed doctors had issued opinions that Ferguson was schizophrenic and incompetent. Indeed, the picture counsel paints is of a defendant who is chronically and seriously mentally ill. This is not an accurate portrait of the defendant. Petitioner ignores the fact that since 1978, the evidence is very much conflicting as to whether or not Petitioner suffers from any mental disorder aside from antisocial personality disorder and that a consensus has emerged among the reviewing courts, both state and federal, that Ferguson consciously malingers his mental condition.

At the time of Petitioner's Carol City trial, trial counsel challenged Ferguson's competency and planned to pursue an insanity defense. Ferguson was examined by four court appointed doctors, and after reviewing the reports and taking depositions, trial counsel decided that the evidence of his mental illness was weak, and, would open up serious rebuttal in the form of evidence that Ferguson was a highly dangerous psychopath who was consciously

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[1] This Court's Rule 15.2 admonishes counsel that they have an obligation to this Court to point out in the brief in opposition "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted."

feigning or malingering symptoms of mental illness. Ferguson v. State, (IV), 593 So. 2d 508, 510-11 (Fla. 1992). While Ferguson selectively cites four doctors in his statement of facts, who opined that Ferguson suffered from a serious mental illness prior to the 1978 trial, he conspicuously ignores the fact that two of these experts, Dr. Mutter, and Dr. Jaslow, subsequently found Ferguson competent to proceed and had come to doubt their original diagnosis of the Petitioner.[2] Dr. Mutter, although initially convinced that Ferguson had a legitimate mental illness, has since consistently found that Ferguson is malingering his mental condition. Most recently, in the federal competency hearing, Dr. Mutter testified "[t]his man is in a very difficult situation, and he is trying to prolong his life." (Competency Hearing, TR. 484).

In his statement of facts, defense counsel faults the State for releasing Petitioner despite the prescient opinions of select doctors that Petitioner suffered from serious mental illness and was extremely dangerous. However, after incarceration, treatment and observation, Ferguson was not deemed to be suffering from any serious mental illness. Petitioner's final discharge diagnosis from Florida State Hospital by Dr. Ogburn, prior to the instant murders, was that he had a personality disorder, antisocial type with a secondary diagnosis of drug abuse. (Hialeah Trial, T2, 1165).

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[2] As summarized in the sentencing order, Dr Mutter and Dr Jaslow [as well as Doctors Graff and Reichenberg], found that Petitioner was competent and either exaggerating or outright malingering (Resentencing Appeal, V1, 16-19).

Similarly, the State disputes Petitioner's characterization of the evidence presented during the post-conviction hearing relating to his childhood. Petitioner asserts that his childhood was one of physical abuse and severe privation, living in a house with no electricity or indoor plumbing, with wild animals running around. In reality, Ferguson's family was poor, but he was fed and the mother, according to her post-conviction testimony, was able to care for her children properly. (PCR-16, 2949). Ferguson's mother testified that she worked hard to provide for her family. Id. The only time Ferguson did not live in a home with modern conveniences such as indoor plumbing or electricity, was a brief period, no more than two or three months when they lived on a family friend's farm. (PCR-16, 2934, 2996).

While there was evidence that one of the mother's boyfriends was physically abusive to the mother, he was not abusive to the children. (PCR-16, 2958, 2973-74). There was no evidence that Petitioner was either physically or sexually abused. The mother would on occasion discipline the girls with an "ironing cord," or belt, but, Patricia Blue, Ferguson's older sister, testified that the mother would not strike Ferguson, apparently showing some favoritism toward him. (PCR-16, 3002). Evidence of Ferguson being physically struck in any manner was limited to testimony that his older sister disciplined all of the children when she was left in charge. However, Patricia Blue testified during the post-conviction hearing that such discipline could not be characterized as abusive. (PCR-16, 3013).

Finally, the State also disputes Petitioner's contention that he did not personally murder any of the victims in the Carol City case.[3] A specific finding was made below that he personally murdered one victim and attempted to kill another:

> [Petitioner] was a principal participant in the planning and execution of the robbery plans and all actions following the leaving of the scene of the crime which were designed to aid in avoiding detection. His participation constituted a major part of the total criminal activity involved. He was personally responsible for shooting two of the victims, killing one of them.

Ferguson v. State, (I), 417 So. 2d 639, 644-45 (Fla. 1982) (emphasis added).

II) Facts Surrounding Ferguson's Convictions And Resolution Of Legal Issues Relevant To This Petition

A) Petitioner's Eight Murder Convictions

(1) The Carol City Murders

The facts as found by the Florida Supreme Court are:

> On July 27, 1977, at approximately 8:15 p.m. the [Petitioner], posing as an employee of the power company, requested permission from Margaret Wooden to enter her Carol City

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[3] Petitioner was solely responsible for the murders of Brian Glenfeldt and Belinda Worley in Hialeah

home and check the electrical outlets. After gaining entry and checking several rooms, [Petitioner] drew a gun and tied and blindfolded Miss Wooden. [Petitioner] then let two men into the house who joined [Petitioner] in searching for drugs and money.

Some two hours later, the owner of the house, Livingston Stocker, and five friends returned home. [Petitioner], who identified himself to Miss Wooden as "Lucky," and his cohorts tied, blindfolded and searched the six men. All seven victims were then moved from the living room to the northeast bedroom.

Shortly thereafter, Miss Wooden's boyfriend, Miller, entered the house. He too was bound and searched. Then he and Miss Wooden were moved to her bedroom and the other six victims were returned to the living room.

At some point, one intruder's mask fell, revealing his face to the others. Miller and Wooden were kneeling on the floor with their upper bodies lying across the bed. Wooden heard shots from the living room then saw a pillow coming toward her head. She was shot. She saw Miller get shot then heard [Petitioner] run out of the room. She managed to get out and run to a neighbor's house to call the police.

When the police arrived they found six dead bodies. All had been shot in the back of the head with their hands tied behind their backs. One of the victims, Johnnie Hall, had

survived a shotgun blast to the back of his head. He testified to the methodical execution of the other men.

On September 15, 1977, [Petitioner] and three co-defendants were indicted for the offenses. Adolphus Archie, the "wheelman", was allowed to plead guilty to second degree murder and a twenty-year concurrent sentence on all counts in exchange for his testimony at trial. He testified that he'd dropped [Petitioner], Marvin Francois, and Beauford White in the Carol City area to "rip off" a drug house. He didn't see the actual shooting but later saw unfamiliar weapons and jewelry in Beauford's and Francois' possession.

Ferguson v. State, 417 So. 2d 639, 640-641 (Fla. 1982) (hereinafter Ferguson I).

(ii) The Hialeah Murders

The pertinent facts regarding the Hialeah murders of the seventeen year old victims, Brian Glenfeldt and Belinda Worley, are set forth in the Florida Supreme Court's direct appeal opinion:

The facts reveal that on January 8, 1978, the two victims were seated in an automobile and while seated therein a gunshot was fired through the window striking Brian Glenfeldt in the arm and chest area. A significant amount of bleeding followed and this victim's blood was found throughout many areas of the front of the automobile as well as on the clothing of Belinda Worley.

> Following the shooting, the female victim ran many hundreds of feet from the car in an attempt to allude the [Petitioner] and was finally overtaken in some rather dense overgrowth and trees. She was subjected to many physical abuses by [Petitioner], including but not limited to, sexual penetration of her vagina and anus. The discovery of embedded dirt in her fingers, on her torso both front and back and in many areas within her mouth and the findings of hemorrhaging around her vagina and anal cavity would indicate that she put up a significant struggle and suffered substantially during the perpetration of these indignities upon her body. Expert testimony indicates that she was a virgin at the time of the occurrence of this crime.
>
> The position of Belinda Worley's body and the location of the wounds on her head would indicate that she was in a kneeling position at the time she was shot through the top of the head. She was left in a partially nude condition in the area where the crime was committed, to be thereafter fed upon by insects and other predators. Physical evidence would substantiate that following the attack upon Belinda Worley, [Petitioner] went back to the car and shot Brian Glenfeldt through the head.

Ferguson v. State, 417 So. 2d 631, 636 (Fla. 1982) (hereinafter Ferguson II).

(B) Relevant State Post-Conviction Litigation

The resentencing and post-conviction facts are extensively discussed in the Florida Supreme Court opinions in this matter. See Ferguson v. State, 474 So. 2d 208 (Fla. 1982) [Ferguson III], (resentencing)]; Ferguson v. State, 593 So. 2d 508 (Fla. 1992) [Ferguson IV] (post-conviction); Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993) [Ferguson V] (state habeas); Ferguson v. State, 789 So. 2d 306 (Fla. 2001) [Ferguson VI] (successive motion for post-conviction relief, competency).

(i) Ineffective Assistance Of Counsel Claims

(a) Carol City

The Florida Supreme Court stated the following, in part, in rejecting the ineffective assistance of counsel claim:

> . . .Ferguson claims that his counsel in the Carol City trial was ineffective for failing to investigate and present mitigating evidence of Ferguson's mental impairment and difficult childhood. At the evidentiary hearing below, Ferguson's counsel testified that he reviewed four psychiatric reports of doctors appointed to examine Ferguson when counsel initially filed an insanity plea. Counsel also spoke to the doctors and took the deposition of the doctor who could provide the most favorable testimony. Although counsel did not obtain any reports prepared by doctors who had examined Ferguson in the past, he must have been aware of the fact that Ferguson's mental

problems dated back to 1971, since this information was revealed in the reports he did review.

Counsel also testified that he spoke to Ferguson's mother and to other family members. One of Ferguson's sisters was apparently reluctant to cooperate because she felt her job with the state attorney's office was jeopardized by her involvement in the case. Ferguson's mother was presented as a penalty phase witness. She testified that Ferguson was a good son, that he liked art and music, and that he helped support her when he was home. She also testified that Ferguson had mental problems and had been in a mental hospital.

In support of his 3.850 motion, Ferguson presented the testimony of several family members who had not testified at the original sentencing. This testimony indicated that Ferguson's childhood was difficult. His family was poor and moved around a lot, and his mother worked most of the time to support the children. His father was an alcoholic, who died when Ferguson was thirteen. The death of his father depressed Ferguson, and he began having run-ins with the law and problems in school. Ferguson's mother had many boyfriends, some of whom physically abused her in front of the children. Testimony was also presented that Ferguson was shot by a policeman; following this shooting Ferguson's behavior changed-he became paranoid and

hostile. [FN1]

> [FN1] We note that the admission of this evidence would have allowed the jury to hear the circumstances behind the shooting, which were not favorable to Ferguson.

The circuit judge found that counsel did conduct a reasonable investigation into Ferguson's family background and mental history and that his performance was not deficient. Although counsel did not exhaust all available sources of information by obtaining additional doctor's reports, hospital records, school records, or court records, this was not a case in which the attorney conducted only minimal investigation. Counsel interviewed family members and presented the testimony of Ferguson's mother. He was aware of Ferguson's mental problems, having reviewed reports prepared at his request and having interviewed the doctors who examined his client. The circuit judge concluded that counsel had made a tactical decision not to call the doctors as witnesses. Counsel had the information before him and could have reasonably decided that presenting mental illness testimony would have opened the door to extremely damaging State rebuttal. Several doctors indicated that they believed Ferguson was malingering, that he was a sociopath, not schizophrenic, and that he was a very dangerous person. Instead of opening the door

to this evidence, counsel informed the jury of Ferguson's mental condition through the testimony of Ferguson's mother, who discussed the fact that he had mental problems and had been in a mental hospital. This was a reasonable strategy in light of the negative aspects of the expert testimony. We affirm the circuit court's finding that Ferguson has failed to establish that the performance of his Carol City trial counsel was deficient.

(b) Hialeah

The Florida Supreme Court, in the same appeal, also rejected Petitioner's claim that his Hialeah counsel was ineffective, stating, in part:

Ferguson's claim that his Hialeah trial counsel was ineffective is similar, in that it is also based on counsel's alleged lack of investigation and presentation of mitigating evidence of Ferguson's mental illness and poor childhood. Ferguson also argues that his counsel was ineffective for failing to object during the prosecutor's closing argument and for making an inadequate closing argument himself.

In the penalty phase of the Hialeah trial, no mitigating evidence was presented by the defense. Ferguson asserts that counsel should have put on mental mitigating evidence. Unlike the Carol City case, Ferguson does not claim here that counsel failed to investigate

the extent of his mental illness. At the guilt phase of the trial, the defense claimed that Ferguson was insane, and numerous experts testified extensively as to Ferguson's mental problems. Counsel was fully aware that the standard for finding the statutory mitigating circumstances [FN2] to be applicable is lower than the M'Naghten insanity standard. Obviously if defense experts thought Ferguson met the higher standard for insanity they also believed he met the lower standard for statutory mitigation. In his penalty phase closing, counsel argued that the statutory mental mitigating factors applied to Ferguson, noting that even the State's experts agreed that Ferguson had a serious mental illness. Counsel testified at the hearing below that he and cocounsel considered putting the doctors on again and concluded that it would be cumulative. Counsel cannot be faulted for not recalling his experts at the penalty phase or parading still more experts in front of the jury.

> [FN2] § 921.141(6)(b) (the defendant was under the influence of extreme mental or emotional disturbance); (6)(f) (the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired), Fla.Stat. (1977).

> We also find no deficiency in counsel's failure to present evidence of Ferguson's family background. Counsel was in touch with members of Ferguson's family. Ferguson's mother was called to the witness stand in the penalty phase. She was unable to testify when she became hysterical and nearly fainted, and counsel chose to remove her from the stand. Although counsel could have asked for a continuance to allow Ferguson's mother to compose herself, the decision to withdraw this witness was certainly reasonable in light of her emotional state. There was no connotation that she was removed because she could have nothing good to say about her son.

Ferguson, (IV) 593 So. 2d at 510 -511.

The Florida Supreme Court also found, that assuming that some deficiency could be discerned in counsel's conduct, Ferguson failed to carry his burden of establishing prejudice. The court stated:

> While we have concluded that counsel did not render ineffective assistance in either case, we also hold that Ferguson did not meet his burden under the second prong of the *Strickland* test. In other words, even if it could be said that counsel was ineffective, there is no reasonable probability that the result would have been different, in the absence of any deficient performance.

Ferguson (IV), 593 So. 2d at 512.

ii) State Court Treatment of Alleged Hitchcock Error

The Florida Supreme Court found no Hitchcock error in the Carol City case, stating, in part:

> In the Carol City trial, the judge instructed the jury as follows:
>
> > The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence . . . [listing the statutory aggravating factors]. The mitigating circumstances which you may consider, if established by the evidence, are these . . . [listing the statutory mitigating factors].
> >
> > The aggravating circumstances which you may consider are limited to those upon which I have just instructed you. *However, there is no such limitation upon the mitigating factors which you may consider.* (Emphasis added.)
>
> An instruction virtually identical to this instruction was given in *Adams v. State*, 543 So. 2d 1244 (Fla. 1989). This Court rejected Adams' *Hitchcock* claim, finding that "[i]n view of the instruction which was given, we are convinced that the jury was not misled concerning its ability to consider nonstatutory

> mitigating circumstances...." *Id.* at 1248. [Petitioner] argues that *Adams* is distinguishable because in that case the judge decided to give the instruction after the prosecutor argued in his closing that only statutory mitigation could be considered. Here, the instruction was given after previous instructions by the court itself had implied that only statutory mitigation could be considered. Although we agree that the motivation for giving the curative instruction may have been different in *Adams*, this does not change the effect of the instruction. As in *Adams*, the jury here was clearly instructed that they were not limited to consideration of the statutory mitigating circumstances, and there was no *Hitchcock* error.

Ferguson IV, 593 So. 2d at 512.

In the Hialeah case, the State conceded error, but argued it was harmless under the circumstances. The Florida Supreme Court agreed, stating:

> In the Hialeah case, the State has conceded that the instructions given were improper because they failed to adequately explain that the jury could consider nonstatutory mitigating evidence. Therefore, our consideration of Ferguson's argument that Hitchcock error entitles him to a new sentencing requires us to determine whether this error was harmless beyond a reasonable doubt.

The circuit court found the Hitchcock error to be harmless. The Hialeah jury had before it extensive evidence of Ferguson's mental problems from the expert testimony at the guilt phase, but did not find the evidence significant enough, when compared to the evidence in aggravation, to recommend a life sentence. The additional mitigating evidence presented at the 3.850 hearing was relatively insignificant. Although Ferguson's family was poor and somewhat unstable, his mother did her best to provide for the children, and there was no testimony that Ferguson himself was beaten or abused.

This mitigation is especially insignificant in light of the heinous nature of the killings in this case and the overwhelming aggravating factors. We discussed these murders in detail in our opinion on direct appeal.

* * *

The following aggravating circumstances were found: (1) Ferguson had committed three prior violent felonies; [FN3] (2) the murders were committed in the course of a robbery; (3) the murders were committed to avoid lawful arrest; (4) the murders were especially heinous, atrocious, or cruel; and (5) the murders were cold, calculated, and premeditated.

> [FN3] Assault with intent to commit rape; robbery; and resisting an officer with violence.
>
> We affirm the circuit court's finding that the Hitchcock error was harmless. Even if the nonstatutory mitigating evidence introduced at the 3.850 hearing had been presented and the jury had been specifically told it should consider nonstatutory mitigation in the weighing process, we are convinced beyond a reasonable doubt that the outcome would be the same.

Ferguson, 593 So.2d at 512-513.

(C) The Federal District Court's Competency Hearing

On July 9, 2004, the District Court entered an order setting an evidentiary hearing to determine whether Ferguson was competent to assist counsel with his habeas proceeding. The court conducted a five-day hearing which commenced the week of December 6, 2004. The court made detailed legal and factual findings, including, the following:

> From the testimony and evidence presented, the court finds that petitioner understands these proceedings and is competent to consult with his attorneys with a reasonable degree of rational understanding. The court finds that the assessments offered by Dr. Mutter and Dr. Suarez as to Mr.

> Ferguson's present mental state are credible and worthy of belief, i.e., petitioner is in remission and is malingering or exaggerating symptoms for the purpose of feigning mental illness. In making this finding, the court has fully considered the contrary assessments and opinions of petitioner's experts but ultimately has rejected them as neither credible nor worthy of belief. The court notes that multiple mental health examinations administered to Mr. Ferguson indicate that he is either significantly over-reporting or consciously exaggerating symptoms of chronic paranoid schizophrenia. . .

(Dkt.#107-Competency Order, 15). On the same day, the District Court entered an order denying all of the claims in his federal habeas petition.

D) The Eleventh Circuit

Petitioner appealed the denial of federal habeas relief to the Eleventh Circuit Court of Appeals. The State filed a notice of cross-appeal, challenging Petitioner's right to an indefinite stay of his habeas proceedings on the basis of his alleged incompetency.[4] The Eleventh Circuit affirmed the denial of habeas relief on August 26, 2009 and denied rehearing December 31, 2009. The mandate issued January 8, 2010.

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[4] The Eleventh Circuit declined to address the State's cross-appeal on the competency issue since the State prevailed below when the District Court found Ferguson was malingering and competent

REASONS FOR DENYING THE WRIT

I & II

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE DENIAL OF HABEAS RELIEF ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL IN A CASE WHICH DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT, WHICH PRESENTS NO SIGNIFICANT OR IMPORTANT FEDERAL QUESTION AND WHOSE RESULT IS NOT FAIRLY DEBATABLE?

Petitioner argues that this Court should review the Eleventh Circuit's decision denying his writ of habeas corpus on the basis of ineffective assistance of penalty phase counsel. However, there is no basis for granting certiorari review of this case. There is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding the denial of relief, and Petitioner has not established any reason for this Court to grant review of these fact-specific claims.

Petitioner does not assert that the claim presents an important question of constitutional law that this Court has yet to decide. Rather, Ferguson asserts a conflict with this Court's decisions in Porter v. McCollum, 130 S. Ct. 447 (2009), Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard, 545 U.S. 374 (2005). However, neither Wiggins, Porter, Williams v. Taylor, 529 U.S. 362 (2000) nor Rompilla

change the law as set forth in Strickland v. Washington, 466 U.S. 668 (1984) on the appropriate standard to be applied upon review of ineffective assistance of counsel claims. See Wiggins, 539 U.S., at 522 (explaining that the Court "made no new law in resolving Williams' ineffectiveness claim," but instead applied the clearly established Strickland standard.); Williams v. Taylor, 529 U.S. 362, 390 (2000) (noting that the merits of Williams' claim "are squarely governed by our holding in Strickland."); Rompilla, 545 U.S., at 380, (recognizing that Rompilla's entitlement to federal habeas relief turns on resolution of his claim of ineffective assistance of counsel under Strickland.) Moreover, Ferguson's claim of conflict does not survive even a cursory comparison between these cases. Rather, his real complaint is in the manner in which the lower courts applied Strickland after a full post-conviction hearing in state court. Such assertions merely implicate an alleged "misapplication of a properly stated rule of law" Sup. Ct. R. 10. Accordingly, certiorari review should be denied.

Petitioner's primary claim of conflict emanates from this Court's recent decision in Porter v. McCollum, 130 S. Ct. 447, 453 (2009). However, Ferguson's case stands in stark contrast to Porter, where defense counsel failed to investigate, "uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." Porter applied well established law [Strickland] to a much different factual situation from that presented here.

Porter's counsel conducted an extremely limited investigation into Porter's background and entirely failed to present the most significant mitigation readily available to Porter, his extensive combat experience in Korea and its continuing psychological impact upon him. Porter on its facts was focused upon the unique nature of military service and, specifically, the weighty mitigation of a defendant who had seen considerable combat. Id. at 449-51, 455.

The mitigation evidence was much stronger in Porter and his crimes, [two murders] were much less aggravated than those in the instant case. The defendant's military service was critical to the holding in Porter. See Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1249 (11th Cir. 2010) (noting that the defendant's extensive combat service was critical to the Supreme Court's decision in Porter). Moreover, in Porter there was no finding, as here, that the proposed mitigating mental health evidence [Carol City case] would have opened the door to damaging evidence that could be used by the State [antisocial personality disorder, prior crimes, malingering]. Id. at 454-55.

In contrast to Porter, Ferguson's counsel investigated his background, interviewed his mother and one or more sisters, and by challenging Ferguson's competency, had him examined by several mental health experts. Through depositions, he was aware of Ferguson's mental health history but also aware that the mental health experts were questioning the legitimacy of his mental health

symptoms and that four court appointed doctors outright concluded he was feigning mental illness in an attempt to extricate himself from serious legal jeopardy. Thus, unlike Porter, there was a strategic reason for counsel [Carol City] not to present mental health mitigation. Since Porter does not conflict with the Eleventh Circuit's decision in this case, review should be denied.

The Eleventh Circuit found it easier to dispose of Petitioner's claims on the prejudice prong, assuming *arguendo*, a deficiency had been established. This is a perfectly acceptable application of controlling precedent from this Court. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")

The Eleventh Circuit provided the following analysis of the prejudice prong in the Carol City case:

> Even assuming *arguendo* that Robbins's performance was deficient, Ferguson has not shown prejudice resulting from that deficient performance. The resentencing judge found five aggravating circumstances in this case: (1) Ferguson previously had been convicted of "three felonies involving the use of, or threat of, violence to some person [FN9];" (2) the murders were committed while Ferguson "was engaged in the commission of multiple robberies;" (3) the murders were committed "for the purpose of avoiding or preventing a

lawful arrest;" (4) the murders were "especially heinous, atrocious and cruel;" and (5) the crimes involved homicides "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." App. MM, Vol. 3 at 1-6. By comparison, the only possible mitigating circumstance identified by any of the courts assessing Ferguson's case was that there was some evidence to indicate that Ferguson might have been suffering severe mental disturbance at the time of murders and that he had an impaired capacity to appreciate the criminality of his conduct. All of these findings are entitled to a presumption of correctness, and the parties identify no basis for questioning this presumption. *See Hardwick*, 320 F.3d at 1158.

> [FN9] The felonies were a 1965 conviction for assault with intent to commit rape, a 1971 conviction for robbery, and a 1976 conviction for violent resistance to a police officer.
>
> [FN 10, 11, 12 omitted]

In our view, the aggravating circumstances far outweigh any mitigating factors, even taking into account the evidence that Robbins failed to uncover. The facts of this case are extreme, including multiple execution-style killings after a prolonged period in which the victims were bound and blindfolded. We agree with the resentencing court that "[t]he entire action of [Ferguson] and his co-conspirators reflects not only an absolute lack of concern for

> human life or dignity but also a barbaric cruelty." App. MM, Vol. 3 at 6. As a result, we do not believe it is reasonably probable that the evidence Ferguson cites would lead a jury to disregard such cruel circumstances and impose a different sentence. We thus find that Ferguson has not established prejudice from this ineffective assistance and therefore conclude that the district court correctly denied habeas relief with respect to this part of Ferguson's IAC claim.

Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183, 1196-1197 (11th Cir. 2009) (emphasis added).

Further, it must be noted that each of these cases operated to add the considerable weight of multiple murders to the prior violent felony aggravator. See Wong v. Belmontes, 130 S. Ct. 383, 391 (2009) (noting that revelation of a defendant committing another murder is among the most powerful aggravating evidence). The Eleventh Circuit held as to the Hialeah case:

> As in the Carol City trial, even if we assume that Ferguson's Hialeah trial counsel was deficient during the penalty phase, it is not reasonably probable that the jury would have imposed a different sentence had they considered the missing mitigation evidence. On resentencing, the circuit court found six aggravating factors: (1) Ferguson previously had been convicted of four felonies involving the use or threat of violence [FN15]; (2) the murders occurred while Ferguson was

"engaged in the commission of rape and robbery;" (3) the murders were committed to avoid a lawful arrest; (4) the murders were "committed for pecuniary gain;" (5) the murders were "especially heinous, atrocious, and cruel;" and (6) Ferguson's crimes were committed "in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." [FN16] App. MM, Vol. 3 at 13-16. The only potential mitigating factor the court identified was that Ferguson might have been suffering from extreme mental disturbance and been impaired in his ability to appreciate the criminality of his conduct.

We find that the aggravating factors significantly outweighed any mitigating evidence, including that which was not presented to the jury. The facts of the Hialeah murders are just as cruel and shocking as those of the Carol City killings. One of the victims, Worley, suffered extreme physical abuse, including being apparently raped, prior to being shot in the head and left partially nude by the roadside. The other victim, Glenfeld, was shot twice, both before and after Worley had been sexually assaulted, and murdered. Admittedly, at least two jurors decided not to impose the death penalty even in the face of such circumstances. [FN1] Nevertheless, the missing evidence likely would not have changed the outcome. Notably, most of the evidence regarding Ferguson's medical background already had been

presented during the guilt phase of the trial, so the jury considered that evidence in sentencing him to death. The missing evidence thus primarily involved Ferguson's family history. Although it is possible that evidence of Ferguson's mental history might have caused some jurors to recommend a sentence rather than death, we do not find that this was reasonably probable given the wealth of aggravating circumstances. See Parker v. Secretary for the Dep't of Corr., 331 F.3d 764, 783 & n.16 (11th Cir. 2003) (noting that the proper standard of review is "whether the jury's failure to hear the mitigating evidence undermines the confidence in its verdict, thus demonstrating a reasonable probability of a different result" rather than whether the result "would have been different absent the deficient performance") (alterations, quotation marks, and citation omitted). Accordingly, we find that Ferguson has not met the prejudice prong and conclude that the district court correctly denied Ferguson habeas relief with respect to his IAC claim regarding the penalty phase of the Hialeah trial. [FN18]

[FN15] These are the three felonies described supra n. 10, along with the Carol City murders.

[FN16] As in the Carol City case, the "cold, calculated, and premeditated" factor was addressed for the first time on resentencing, though the Florida Supreme Court found no error in the circuit court's reliance on it. The original

> trial court also found a fifth aggravating factor, that Ferguson committed the crimes while under a sentence of imprisonment; however, the Florida Supreme Court overturned this finding since he was not confined in prison at the time and was not supposed to be.
>
> [FN17] The actual number of jurors voting against the death penalty is unknown. At trial, the court began polling the jurors to confirm that the majority of the jury had voted to sentence Ferguson to death. Two of the jurors misunderstood and indicated that they personally had voted against a sentence of death; however, the court corrected this erroneous assumption before other jurors had an opportunity to signal their vote.
>
> [FN18 omitted]

Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183, 1198-1199 (11th Cir. 2009).

Petitioner apparently contends the Eleventh Circuit did not sufficiently weigh the proposed mitigation evidence against the case in aggravation, and, instead, simply found the case highly aggravated. This is not an accurate characterization of the Eleventh Circuit's opinion. As reflected above, the court did weigh the proposed mitigation, but simply found it did not, in light of the overwhelming weight of aggravation, offer a reasonable probability of a different outcome; a reasonable application of

Strickland under the facts of this case. See Woodford v. Visciotti, 537 U.S. 19, 26, 123 S. Ct. 357, 361 (2002) (reversing the Ninth Circuit's prejudice finding based upon the failure to present the defendant's troubled and dysfunctional background and possible brain damage where the aggravating factors for the execution-style killing of one victim and attempted execution-style killing of another, "coupled with the aggravating evidence of prior offenses. . . .was devastating.")(citations omitted).

The Carol City case did not involve a single homicide, but the slaughter of six human beings and the attempted murder of two others. Petitioner's two Hialeah murders were devastatingly brutal. Petitioner's crimes are shocking, even by capital case standards. When coupled with Ferguson's violent prior offenses, the State's case in aggravation was simply overwhelming. The aggravating factors in both cases included two of the weightiest under Florida's capital sentencing scheme, CCP and HAC. Larkins v. State, 739 So. 2d 90, 92-95 (Fla. 1999) (The heinous, atrocious or cruel and the cold, calculated, and premeditated aggravating factors are considered two of the weightiest factors in the capital balancing equation). The Petitioner failed to demonstrate that the introduction of the conflicting psychiatric evidence, or family background evidence, would have explained or justified the defendant's

actions in committing these murders so as to warrant life sentences. Strickland, *supra*.[5]

A determination of whether the Eleventh Circuit's rejection of Petitioner's ineffective assistance claim on the lack of prejudice under Strickland is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. As such, this Court should decline to exercise certiorari jurisdiction over this case. See Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140 (1985); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955); Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923). Moreover, a review of the Eleventh Circuit's detailed opinion accompanying the denial of this claim establishes correct application of this Court's precedent.

In this case, the state courts and the district court below did not find that Ferguson had met his burden of establishing deficient performance under Strickland in either the Hialeah or Carol City cases. While the Eleventh Circuit acceptably found it easier to dispose of the ineffectiveness claims on the lack of prejudice, the State notes that it was not shown below that trial counsel in either case was deficient.

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[5] The State's already massive case in aggravation would be even more powerful on remand, where the State could introduce two additional murders in aggravation The jury would learn not only of Ferguson's Hialeah murder convictions but the horrible details of those offenses See United States v. Wasman, 700 F.2d 663, 668-669 (11th Cir 1983), Daugherty v State, 419 So. 2d 1067, 1069 (Fla 1982)

In the Carol City trial, counsel initially challenged Ferguson's competency, but, after receiving the doctors reports and taking depositions, realized a mental health defense would not be successful. The available mental health testimony would reveal damaging information about the defendant. This Court has repeatedly recognized that trial counsel may reasonably make a tactical decision not to present mitigating evidence where such evidence would "open the door" to negative information about the defendant. See Wong v. Belmontes, 130 S. Ct. 383, 388-389 (2009); Darden v. Wainwright, 477 U.S. 168, 186, 106 S. Ct. 2464, 2474 (1986); Burger v. Kemp, 483 U.S. 776, 792 ,107 S. Ct. 3114, 3124 (1987).

As for Ferguson's family background, in the Carol City case, Ferguson's trial attorney interviewed those closest to him, those who shared a home and who were likely to be motivated to help him, his mother and sisters. Ferguson's mother testified in the penalty phase, although admittedly, she provided somewhat limited testimony.

With regard to the Hialeah trial, counsel presented an insanity defense and fully investigated Petitioner's mental health background. Defense counsel chose not to recall his guilt phase experts to testify in the penalty phase. Mr. Hacker explained: The "jury and the Judge had already heard everything they were going to say and that to call them would be simply repeating themselves. So it was decided not to do it." (PCR-17, 3161). Such "[s]trategic choices made after thorough investigation

of the law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

It is not ineffective assistance of counsel to rely on insanity evidence presented in the guilt phase to establish mental mitigation in the penalty phase. Bell v. Cone, 535 U.S. 685 (2002). "Because the defense's theory at the guilt phase was not guilty by reason of insanity, counsel was able to put before the jury extensive testimony about what he believed to be the most compelling mitigating evidence in the case." Bell, 535 U.S. at 699.

The mere incantation of Wiggins in Ferguson's petition does not suffice to show a conflict with that case. In assessing the prejudice prong of Strickland, this Court reweighed the evidence in aggravation against the totality of the mitigating evidence and determined the evidence of severe privation, physical and sexual abuse and rape, periods of homelessness and diminished mental capacities, comprised the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535. Noting that in Maryland [unlike Florida], the death recommendation must be unanimous, the High Court determined, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that one juror would have struck a different balance." Id. at 537.

The mitigating evidence in Wiggins was far more compelling than the instant case and did not carry the risk of revealing damaging information about the defendant [uncharged crimes, malingering, psychopath]. Moreover, Petitioner was not subject to either sexual or physical abuse like the defendant in Wiggins who was shuttled from foster home to foster home and was left homeless. Ferguson's family history and background is unremarkable in comparison.[6]

While Petitioner's family was poor and the mother had been in an abusive relationship, the defendant was cared for, and, with the exception of three months spent on a farm, he did not live a life of severe privation and was not physically or sexually abused like the defendant in Wiggins. Perhaps, even more important, the defendant's role in the murder in Wiggins was uncertain and the crime was far less aggravated than the multiple murders committed by Petitioner in this case. Consequently, Wiggins does not conflict with the Eleventh Circuit's decision here.

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[6] As summarized by the Florida Supreme Court, in Ferguson v State, 593 So 2d 508, 510 (Fla 1992):

> . . .His family was poor and moved around a lot, and his mother worked most of the time to support the children His father was an alcoholic, who died when Ferguson was thirteen The death of his father depressed Ferguson, and he began having run-ins with the law and problems in school Ferguson's mother had many boyfriends, some of whom physically abused her in front of the children . .

Petitioner's citation to various Courts of Appeals' decisions does not establish any conflict with the Eleventh Circuit decision in this case. (Certiorari Petition at 26-32). There is no conflict of law among the courts of appeal, simply fact dependent applications of Strickland's prejudice prong. The cases cited by Petitioner are generally distinguishable by being less aggravated and/or more mitigated than the instant case. See e.g. Correll v. Ryan, 539 F.3d 938, 954-55 (9th Cir. 2008) (noting that this was a rare capital case in which the defendant had not "actually killed any of the victims" and trial counsel failed to present significant mitigating evidence, including brain damage, childhood abuse, parental abandonment at the age of 14, and addiction to drugs); Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002) (less aggravated, with two murders, balanced against more significant mitigation, including low IQ, poverty, family dysfunction, and, in contrast to this case, much more severe evidence of parental abuse); Smith v. Mullen, 379 F.3d 919 (10th Cir. 2004) (heavily aggravated multiple murders which arose from a single apparently impulsive criminal episode where significant mitigating evidence of illiteracy, organic brain damage, possible retardation or, borderline retardation and troubled background was not presented).[7] Since there is no conflict on an important issue of law among the various courts of appeal, there is no basis for certiorari review.

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[7] Petitioner is of average intelligence. (Competency Hearing, TR. 675-76)

In conclusion, Petitioner has not demonstrated that the Eleventh Circuit's opinion decided an important question of federal law in a manner that conflicts with a decision of this Court. See, Sup. Ct. R. 10. The rejection of Petitioner's ineffective assistance of counsel claims was fully consistent with this Court's precedent and all applicable federal law. Consequently, this Court should decline to exercise its certiorari jurisdiction.

III

THIS COURT SHOULD DECLINE REVIEW OF THE HARMLESS ERROR ANALYSIS UNDERTAKEN BY THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS ON ALLEGATIONS OF HITCHCOCK V. DUGGER, 481 U.S. 393 (1987), ERROR WHERE IT IS CLEAR THAT UNDER ANY REASONABLE VIEW OF THE FACTS, THE ERROR(S) COULD NOT HAVE AFFECTED THE OUTCOME OF PETITIONER'S PENALTY PHASES?

Petitioner asserts conflict with this Court's precedents, but, in reality he seeks only a fact based review of the harmless error review conducted by the lower state and federal courts. The Eleventh Circuit employed well established precedent, Brecht v. Abrahamson, 507 U.S. 619 (1993), to find any Hitchcock errors in the Hialeah and Carol City trials harmless. The correctness of the finding of harmlessness is a factual determination with no implications beyond the parties involved in this case, mandating the denial of certiorari review. See Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Moreover, the sufficiency of the Eleventh Circuit's analysis is established by a review of that opinion.

Initially, the State notes that the Carol City jury instructions did not violate Hitchcock. The trial court in the Carol City case instructed the jury that it was "limited to . . . the following" listed factors in aggravation. (Carol City, V4, 1072-74). They were then instructed that they "may consider" the listed mitigating circumstances if established by the evidence. This was followed up with the court telling the jury again that it was limited to considering only the aggravating factors the court listed for them, but that there was "no such limitation upon the mitigating factors" that they could consider. Id. at 1075. There was nothing misleading about these instructions, and they comply with Hitchcock.

The Florida Supreme Court rejected Ferguson's claim of error below, stating: "[T]he jury here was clearly instructed that they were not limited to consideration of the statutory mitigating circumstances, and there was no Hitchcock error." Ferguson IV, 593 So. 2d at 512. The District Court agreed with the reasoning employed by the Florida Supreme Court, and, citing Quince v. Crosby, 360 F.3d 1259, 1267 (11th Cir. 2004), stated: "[A]fter reviewing the record and the parties' briefs, this court holds that the Florida Supreme Court's finding that the jury was not limited in its consideration of mitigating circumstances is fairly supported by the record. Thus, this court finds that Petitioner's Hitchcock claim does not provide a basis for relief as to the Carol City trial." (Order, pp. 36-37).

The Eleventh Circuit, however, given the potentially misleading or conflicting nature of the instructions, assumed a violation of Hitchcock. The court, applying well established law, found the error harmless under the "substantial" and "injurious" test of Brecht.

The Eleventh Circuit stated the following [in part], in rejecting this claim:

> . . .Since the error thus did not have a "substantial and injurious effect or influence in determining the jury's verdict," we conclude that it was harmless and that the district court correctly denied Ferguson habeas relief for this claim. *Sims*, 155 F.3d at 1315 (quotation marks and citations omitted).

Ferguson v. Secretary for Dept. of Corrections, 580 F 3d 1183, 1200-1203 (11th Cir. 2009).

As to the Hialeah trial, where error had been conceded by the State, the Eleventh Circuit also found the error harmless, stating, in part:

> At the Hialeah trial, the judge's first two instructions relating to mitigating circumstances were essentially the same as those in the Carol City trial. Unlike in the Carol City proceedings, though, he made no subsequent statement informing the jurors that they were not limited in the mitigating factors they could consider. The parties concede that these instructions constituted a *Hitchcock* error. We therefore must decide

whether this error was harmless under the *Brecht* standard.

The Florida Supreme Court rejected Ferguson's *Hitchcock* claim during the 3.850 proceedings. [FN27] It found that there had been a *Hitchcock* error in the Hialeah trial but concluded that the error was harmless "beyond a reasonable doubt." *Ferguson IV*, 593 So.2d at 513. The court described the additional mitigating evidence presented at the 3.850 hearing, which dealt Ferguson's family history, as "relatively insignificant." *Id.* at 512. It then went on to note that the mitigating evidence was "especially insignificant in light of the heinous nature of the killings in this case and the overwhelming aggravating factors." [FN28] *Id.*

FN27. The circuit court in those proceedings found that the *Hitchcock* error was harmless beyond a reasonable doubt since the trial court had told the jury to consider all of the evidence. The trial judge instructed the jury to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." App. LL, Vol. 6 at 1463-64.

FN28. It is unclear whether, in making this statement, the court was describing solely the mitigating evidence from the 3.850 hearing or all of the mitigating evidence in the case.

The district court agreed that the *Hitchcock* error "was harmless beyond a reasonable doubt." R4-108 at 37. In support of this conclusion, the court cited both the egregiousness of the aggravating circumstances and the fact that the jury already had discounted the non-statutory mental health evidence when it considered and rejected Ferguson's insanity defense. The court also agreed with the Florida Supreme Court that the outcome would have been the same even if the non-statutory mitigating evidence produced at the 3.850 hearing had been taken into account.

Ferguson notes that there was a wealth of evidence produced at trial regarding his psychological problems and that he exhibited bizarre behavior during the course of the trial. He asserts that the jury did not consider this evidence in imposing sentence because his counsel presented it only in terms of an insanity defense and did not connect it to a statutory mitigating factor. As previously noted, there is a reasonable argument that the jury did not take the mental health evidence into account because of the language of the jury instructions regarding mental duress and inability to appreciate the impact of one's actions. *See* n.24 *supra*. However, the judge's instruction to consider and weigh all of the evidence may mitigate the fact that counsel did not connect the evidence to a statutory mitigating factor.

> Even if we accept Ferguson's contention that the jury did not consider the evidence, we do not believe that the *Hitchcock* error would have changed the outcome. The evidence Ferguson cites here is essentially the same as that which he referenced with respect to the prejudice prong of his ineffective assistance claim. In fact, it may even be less since Ferguson has not identified a basis for us to take into account evidence that was not produced at trial. *See Smith*, 61 F.3d at 817. Since that evidence was insufficient to meet *Strickland*'s requirement that there be a "reasonable probability" of affecting the outcome, it likewise would not be enough to show the "substantial and injurious effect or influence" on the verdict required under *Brecht*. *Sims*, 155 F.3d at 1315 (quotation marks and citations omitted). Furthermore, as in the Carol City case, it is highly improbable that enough jurors would find that the multiple egregious aggravating factors were outweighed by this unconsidered mitigation evidence. We therefore conclude that the *Hitchcock* error in the Hialeah trial was harmless and that the district court properly denied Ferguson habeas relief with respect to this claim.

Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183, 1203-1204 (11th Cir. 2009).

Petitioner has failed to demonstrate that the Eleventh Circuit's harmless error review was inconsistent with any decision from this Court. A fact intensive harmless error review of this case would have no impact beyond the interests of the parties to this case. See Rudolph v. United States, 370 U.S. 269 (1962) (recognizing that a certiorari petition predicated on reviewing facts of importance only "to the litigants themselves" was an inappropriate grounds to grant a writ). Furthermore, the sufficiency of the Eleventh Circuit's Brecht analysis and the Florida Supreme Court's more stringent harmless beyond a reasonable doubt review, are clearly established by a review of those courts' opinions. See Barclay v. Florida, 463 U.S. 939, 958 (1983) (wherein this Court recognized that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless). Because no meaningful constitutional question has been presented, Respondent submits that this Court should deny review of the instant case.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN ERROL FERGUSON
OR DOROTHY FERGUSON, INDIVIDUALLY
AND AS NEXT FRIEND ON BEHALF OF
JOHN ERROL FERGUSON,

Petitioners,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
WALTER A. MCNEIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE
Supreme Court of the United States

No. 09-1186

JOHN ERROL FERGUSON
OR DOROTHY FERGUSON, INDIVIDUALLY
AND AS NEXT FRIEND ON BEHALF OF
JOHN ERROL FERGUSON,

Petitioners,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
WALTER A. MCNEIL,

Respondent.

REPLY BRIEF FOR PETITIONERS

1. The brief in opposition (Opposition) spends 43 pages attempting to harmonize the Eleventh Circuit's novel rule with the decisions of this Court and at least four other circuit courts. But what the Opposition notably fails to do in those 43 pages is to explain why, at the very least, this Court should not enter a grant-vacate-remand (GVR) order so that the Eleventh Circuit may reconsider its decision in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009). And for good reason: As this Court recently reaffirmed, a "GVR is appropriate when 'intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons* v. *Hall*, 130 S. Ct.

727, 731 (2010) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

That is precisely the case here. *Porter* is no doubt a significant "intervening development[ ]," given that it issued three months after the panel below handed down its decision. There is also a "reasonable probability" that the panel below—which contained two of the three judges who sat on the panel in *Porter*—would reconsider their decision if given an opportunity to do so. After all, this Court summarily reversed the Eleventh Circuit in *Porter* because the panel had focused almost exclusively on the "heavy weight" of aggravating factors, *Porter* v. *Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008), instead of evaluating whether the sentencing jury was deprived of hearing "evidence which 'might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Porter*, 130 S. Ct. at 454 (citation omitted). Not surprisingly, that same flawed approach—focusing solely on the "extreme" facts of the crimes, App. 20a—was embraced by the panel below. And given that, as in *Porter*, Ferguson's "judge and jury at * * * sentencing heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability," *Porter*, 130 S. Ct. at 454, a remand with instructions to reconsider in light of *Porter* "may determine the ultimate outcome of the matter." *Wellons*, 130 S. Ct. at 731 (citation omitted).

The GVR mechanism, in short, was designed for precisely these sorts of cases. And the Opposition's failure to join issue on that point only confirms that this Court should follow its established practice, grant the petition, and remand so that the Eleventh

Circuit may reconsider this capital habeas case under the correct legal standard that this Court articulated in *Porter*.

2. Although this case warrants at least a GVR, it is also an excellent vehicle for resolving on a plenary basis the lingering divisions over how to properly assess prejudice at the capital sentencing phase under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The Opposition insists otherwise, but its principal objection is that ineffective-assistance-of-counsel claims by death row inmates are "fact-specific claims" that do not warrant review. Opp. 20. But that was the *exact* same refrain Respondent sang in opposing certiorari in *Porter*. *See* Opp. Br. in *Porter* v. *McCollum*, No. 08-10537, at 20-21. This Court did not accept that theory then; it should not accept it now.

In the same vein, the Opposition suggests that the petition "merely implicate[s] an alleged 'misapplication of a properly stated rule of law.' " Opp. 21 (quoting Sup. Ct. R. 10). Not so. The Eleventh Circuit applied a rule of law that this Court has never embraced: that a petitioner sentenced to death is not prejudiced by counsel's failure to produce mitigating evidence about mental health, privation, and childhood violence unless that evidence would reasonably "lead a jury to *disregard* [the] cruel circumstances" of the crime. App. 20a (emphasis added). That formulation of the *Strickland* test is demonstrably wrong. Never has this Court insisted that mitigating evidence be so potent that it lull a jury into forgetting about the brutality that attends any first-degree murder. To the contrary, this Court has emphasized—and

reaffirmed in *Porter*—that what matters in the calculus is the petitioner's moral culpability: Did counsel's failure to discover and present mitigating evidence deprive the jury from learning about "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability." *Porter*, 130 S. Ct. at 454 (quotation omitted); *see Rompilla* v. *Beard*, 545 U.S. 374, 393 (2005); *Wiggins* v. *Smith* 539 U.S. 510, 535 (2003); *Williams* v. *Taylor*, 529 U.S. 362 (2000).

Although the Opposition soothingly assures this Court that the decision below reflects a "reasonable application of *Strickland*," Opp. 28-29, it never actually explains how the rule that the Eleventh Circuit articulated can be squared with this Court's precedents. Indeed, the Opposition confirms the confusion that pervades this area of law and why certiorari is warranted. Thus the Opposition posits that Ferguson failed to demonstrate prejudice because none of the undiscovered mitigating evidence "would have *explained or justified* the defendant's actions in committing these murders so as to warrant life sentences." Opp. 29-30 (emphasis added). But, of course, this Court has never held that mitigating evidence must rationalize a first-degree murder. After all, evidence showing that a homicide was justified or excused would presumably undermine the entire conviction for first-degree murder. But in any event, the important point is that even the gloss on the Eleventh Circuit's rule offered by the Opposition roundly conflicts with *Porter* and this Court's other precedents.

Respondent nevertheless maintains that there is no conflict with *Porter* because, in Respondent's view,

Porter speaks only to missing mitigation evidence about *military service*. Opp. 22. Respondent is mistaken. To begin with, the petitioner's military service was just one of *four* distinct categories of undisclosed mitigating evidence that this Court examined in *Porter*. *See Porter*, 130 S. Ct. at 454. And one of those other categories—mental-health deficiencies—preceded this Court's discussion of military service. *Id.*

But more importantly, *Porter* is simply the latest in a line of precedents addressing whether unpresented mitigation evidence, including evidence of mental health, mental impairment, family background, *or* military service, would have " 'altered the sentencing profile presented' " during the penalty phase by "humaniz[ing]" the defendant beyond his crimes and thereby "allow [the jury] to accurately gauge his moral culpability." *Id.* Just as in *Porter*, this case involves counsel's failure "to present the most significant mitigation readily available to [the defendant]"—which for Ferguson involved his mental health history during nearly a decade spent in state-run mental hospitals and his debilitating childhood experiences.

Nor can *Porter* be distinguished on its facts, as Respondent also suggests. Opp. 21. *Porter* involved multiple murders, multiple aggravating factors (three, including a finding that the murders were "committed in a cold, calculated, and premeditated manner"), and a failure to present any significant mitigating evidence during the sentencing phase of the trial, even though significant mitigation evidence—including evidence concerning the defendant's history of mental-health issues and his

abusive childhood—was readily available. *Id.* at 449. So too here, across the board. Far from supplying any credible reason to distinguish the two cases, the factual commonalities between the two reinforce why *Porter* is outcome determinative here.

Seeking to downplay counsel's egregious lapses, Respondent also tries to characterize the uninvestigated and unpresented mental-health mitigation evidence as "selective" or "conflicting." Opp. 2, 3, 29. There is nothing remotely "selective" or "conflicting" about this evidence. At least seven different state-appointed doctors examined Ferguson at least eleven times during his nearly decade-long hospitalization. Every single one of them diagnosed him as schizophrenic, psychotic, or hallucinating and reported that his judgment was impaired and he was unable to appropriately differentiate right and wrong. Hrg.Exs.34-43; R.1589-1601.[1]

Respondent's final attempt to explain away the conflict with *Porter* is to conflate evidence of competency and mitigation. Respondent suggests that a capital defendant cannot be prejudiced by unpresented mental-health mitigating evidence if a jury rejected an insanity defense. Opp. 2-3, 22.

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[1] Empirical studies have repeatedly found that this kind of mental-health mitigation evidence powerfully resonates with jurors. *See, e.g.*, Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 Am. U. L. Rev. 1645, 1652–53 (2008) (empirical studies find "special mitigating weight" for evidence of mental illness or defect and childhood abuse); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564-65 (1998) (empirical research shows that a majority of jurors would be less likely to vote for death "if the defendant had a history of mental illness").

Wrong. To begin with, there is a significantly higher standard for a successful insanity defense than is required for a jury to vote for a life sentence. *See* Pet. 13 n.3 (citing cases). Moreover, it is well-settled that "[a]s a legal matter, a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not." *Stevens* v. *McBride*, 489 F.3d 883, 897 (7th Cir. 2007).

3. Certiorari is also warranted based on the conflict identified in the Petition between the Eleventh Circuit's decision and *Rompilla*, 545 U.S. at 378, *Wiggins*, 539 U.S. at 534-538, and *Williams*, 529 U.S. at 390-393. Pet. 22-25. The Opposition offers at best a perfunctory response to these conflicts. All Respondent has to say about the conflict with *Rompilla* and *Williams* is that neither of these cases made new law. Opp. 21. And all Respondent has to say about *Wiggins* is that no conflict exists because it views the unpresented mitigating evidence for Wiggins as "more compelling." Opp. 33.

There is no question that the Eleventh Circuit's prejudice analysis contradicts the way this Court has approached the prejudice inquiry in each of these recent cases. In *Rompilla*, the jury sentenced a defendant to death after finding three aggravating circumstances where his counsel's only mitigation case was family members asking for mercy; counsel failed to investigate any of the leads to mitigation evidence about the defendant's generally disadvantaged upbringing, "extreme mental disturbance," or childhood physical abuse. 545 U.S. at 390-393. In finding his counsel's desultory efforts prejudiced Rompilla, the Court recognized that the

unpresented mitigating evidence "might well have influenced the jury's appraisal of [Rompilla's] culpability" because it amounted "to a mitigation case that b[ore] no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393.

Williams similarly holds that unpresented mitigating evidence "may alter the jury's selection of a penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." 529 U.S. at 398. And *Wiggins* stands for the clear proposition that privation and debilitating mental-health issues in a defendant's past are directly relevant to a moral culpability assessment. 539 U.S. at 534 (citing *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989); *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982); and *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978)). Thus, these cases all make clear that even where a case is death-eligible because of "cruel" or "extreme" facts, unpresented mitigating evidence can undermine confidence in the jury's selection of a death sentence.[2] In conflict with these cases, the Eleventh Circuit discounted the impact of all of the extensive unpresented mitigating evidence based on the "extreme" facts and numerous aggravating factors involved. App. 18a-20a, 23a.

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[2] The Opposition dismisses the conflict with *Wiggins* on the basis that it makes Ferguson's life history look "unremarkable," apparently because Ferguson was not physically or sexually abused. Opp. 33. This ignores that Ferguson grew up in extreme poverty, witnessed and intervened in repeated physical abuse of his mother, was deserted in an abandoned farmhouse, had an alcoholic father, was shot in the head at age 21, and was hospitalized for nearly 10 years with such debilitating diagnoses as schizophrenia, psychosis, and hallucinations. Pet. 5-10.

4. The Eleventh Circuit is out of step with the other circuits on how to assess prejudice resulting from unpresented mitigation evidence. Even where crimes involve horrible facts and multiple aggravating factors, the Sixth, Eighth, Ninth, and Tenth Circuits have faithfully followed this Court's approach to the prejudice inquiry. *See* Pet. 26-32. The Eleventh Circuit is alone in adopting what amounts to a "brutality trumps" inquiry whereby a brutal crime can categorically defeat the prejudice prong of the ineffective-assistance analysis. *Walbey* v. *Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009) (rejecting "brutality trumps" prejudice inquiry).

Respondent contends there is no circuit conflict only by, again, resorting to the refrain that ineffective assistance claims by death-row inmates are "fact dependent" applications of law that cannot establish a conflict. Opp. 34. And instead of attempting to harmonize the Eleventh Circuit's rule with the rule applied by the circuits identified in the petition, Respondent reduces his analysis to nothing more than meaningless parantheticals. Opp. 34.

But the conflict between the Eleventh Circuit and at least the Sixth, Eighth, Ninth, and Tenth Circuits on how to approach prejudice is sharp. The Tenth Circuit's decision in *Smith* v. *Mullin*, 379 F.3d 919 (10th Cir. 2004), exemplifies the circuit split. The Tenth Circuit found prejudice resulting from counsel's deficient representation of a defendant who received five death sentences involving 24 aggravating circumstances. *Id.* at 924, 944. Respondent attempts to characterize that case as involving a "single impulsive criminal episode," Opp. 34, but that had nothing to do with the Tenth

Circuit's prejudice analysis. The court's analysis instead turned on counsel's "meager presentation of mitigating evidence," given the "significant" mitigating evidence that could have been—but was not—presented. *Smith*, 379 F.3d at 939, 941. Recognizing that juries " 'are more likely to vote for life rather than death sentences in cases where there is * * * clear and clearly presented evidence that the defendant has suffered from some form of mental illness,' " the Tenth Circuit found prejudice in the failure of Smith's counsel to present this evidence. *Id.* (citation omitted). That decision—and others like it—squarely conflicts with the Eleventh Circuit's decision below.[3]

5. In a final bid to defeat certiorari, the Opposition spills much ink attempting to show that Ferguson's counsel did not actually render constitutionally ineffective assistance. Opp. 22, 30-31. But that question is irrelevant because the Eleventh Circuit expressly assumed below that Ferguson's counsel were indeed deficient. App. 18a, 22a-23a.

And for good reason. Ferguson's counsel for the Carol City trial admitted during the post-conviction hearing below that there were "no strategic reasons" for failing to investigate and introduce Ferguson's substantial mental-health evidence. R.3051. And he conceded that, had he known of the 11 psychiatric reports generated during Ferguson's near-decade-long stint in mental hospitals—all of which

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[3] *See also* Pet. 26 n.7, 29-32 (discussing *Correll* v. *Ryan*, 539 F.3d 938, 940 (9th Cir. 2008); *Simmons* v. *Luebbers*, 299 F.3d 929 (8th Cir. 2002); *Dickerson* v. *Bagley*, 453 F.3d 690, 691, 696 (6th Cir. 2006); *Gray* v. *Branker*, 529 F.3d 220, 236 (4th Cir. 2008); *Walbey*, 309 F. App'x at 804)).

consistently documented a severely schizophrenic and disturbed man—he "probably would have" used them during the sentencing phase. R.3035. Respondent ignores all this, emphasizing instead that Ferguson's counsel was not ineffective because he "interviewed those closest to him." Opp. 31. But that is disingenuous, to say the least. Counsel did speak to Ferguson's mother, but it is undisputed that he asked her *nothing* about Ferguson's upbringing. R.2946.

In the Hialeah trial, counsel was equally deficient. He failed to investigate *any* aspects of Ferguson's troubled childhood because he erroneously believed that such nonstatutory mitigating evidence would not be admissible. R.3165-66. As this Court has recognized, counsel is undeniably ineffective when he makes judgments based on a clear mistake of law. *See Williams*, 529 U.S. at 395.

6. Finally, the Opposition fails to refute that the Eleventh Circuit's *Hitchcock* analysis does not square with this Court's precedent. Instead, Respondent reprises its refrain that the issue is not cert-worthy because it implicates factual disputes over the application of the harmless-error standard. Opp. 36. But this Court often addresses issues in criminal cases that involve proper application of a harmless-error analysis. *See, e.g.*, *Smith* v. *Texas*, 550 U.S. 297, 316 (2007); *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008); *Neder* v. *United States*, 527 U.S. 1 (1999); *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). These issues are of great importance to defendants and prosecutors alike.

The rest of Respondent's *Hitchcock* argument essentially amounts to cutting and pasting the

Eleventh Circuit's decision into the Opposition (Opp. 38-41) and tacking on a blanket contention that the appellate court's analysis is not inconsistent with any decision from this Court (Opp. 42). Under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), however, the Hitchcock errors rendered Ferguson's death sentences invalid if they "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637-638. The Eleventh Circuit's conclusion that the *Hitchcock* errors did not have a substantial and injurious effect on the jury's deliberations and sentence conflicts with the Court's repeated emphasis on the importance of mitigating evidence—especially mental-health evidence—in shaping a jury's assessment of moral culpability.

CONCLUSION

The Eleventh Circuit—first in *Porter* and now with Ferguson—has twice disregarded powerful mitigation evidence that would have established the " 'kind of troubled history [the Court] ha[s] declared relevant to assessing a defendant's moral culpability.' " *Porter*, 130 S. Ct. at 454 (quoting *Wiggins*, 539 U.S. at 535). As in *Porter*, the staggeringly deficient performance of Ferguson's lawyers left the jurors to gauge Ferguson's moral culpability knowing nothing of his mental health history and the bleak circumstances of his childhood.

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's intervening decision in *Porter*.

Respectfully submitted,

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